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No. 08-___

IN THE

Supreme Court of the United States

JANE DOE, INDIVIDUALLY AND AS NEXT FRIEND OF JULIE DOE, A MINOR,
Petitioner,

v.

MYSPACE, INC. AND NEWS CORPORATION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does Section 230 of the Communications Decency Act of 1996, which preempts state-law claims against interactive service providers that "treat" them as a publisher of a third-party's communications, preclude Jane Doe's negligence and gross-negligence claims against MySpace and News Corporation for failing to employ adequate safeguards to protect children who use MySpace's social-networking website from sexual predators when Doe's claims were not based on harm caused by the content communicated via MySpace's website?

PARTIES TO THE PROCEEDING

The petitioner is Jane Doe, individually and as next friend of Julie Doe, a minor, the plaintiff and plaintiff-appellant in the courts below.

The respondents are MySpace, Inc. and News Corporation.

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PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

Congress enacted Section 230 of the Communications Decency Act of 1996 for the laudable purpose of encouraging providers of interactive computer services to take steps to protect users, and especially children, from being harmed by other users of their services. In order to encourage interactive computer services to take such steps, Congress included sections 230(c) and (e), which preempted a limited class of state-law tort claims that would hold interactive computer services liable as the publisher of tortious speech by other third-party users.

Since §230 has been in effect, the Seventh Circuit has correctly recognized its limits, but other courts have steadily expanded its preemptive scope far beyond what Congress intended. Section 230 was originally intended to preempt only a limited class of state-law claims that would impose tort duties on providers of information communication services if they voluntarily chose to make some effort to police their products for illegal uses by third parties. But the significantly broader interpretation of the statute by many courts has made much of the Internet a virtual Wild West, in which the companies that provide some of the most popular online venues have absolutely no civil-law obligations to play any role in ensuring the safety of their users.

In this case, the Fifth Circuit has gone farther afield from Congress's intent than any prior decision. Under the Fifth Circuit's decision, any state-law claim against MySpace, or other interactive computer services, that is causally related to online communications in any way is preempted by §230. The progressive growth in the scope of §230 has left significant differences among the lower courts regarding the breadth of preemption provided by §230. This Court should grant the petition in order to clarify the preemptive effect of §230.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (App. 1a–17a) is reported at 528 F.3d 413 (2008). The opinion of the District Court of the Western District of Texas (App. 18a–34a) from which the appeal was taken is reported at 474 F.Supp.2d 843 (2007).

JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered its judgment on May 16, 2008. On July 21, 2008, Justice Scalia extended the time within which to file a petition for a writ of certiorari to and including September 12, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

Section 230 of Title 47 of the United States Code is reproduced in the appendix to this petition (App. 36a–40a).

STATEMENT

"Social networking sites are interactive Web sites which allow users to enroll by creating a profile with pictures, personal information, and videos, and they often require that users supply a name, date of birth, and e-mail address." Groppe, A Child's Playground or a Predator's Hunting Ground?—How to Protect Children on Internet Social Networking Sites, 16 CommLaw Conspectus 215, 224 n.78 (2007). MySpace.com is a social-networking website designed and intended to provide a forum where website users, including adults and children, can meet and socialize in cyberspace. App. 42a. MySpace has more than 100 million registered users. *Ibid.*[1]

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[1] See also Duncan, MySpace Is Also Their Space: Ideas for Keeping Children Safe from Sexual Predators on Social-Networking Sites, 96 Ky. L.J. 527, 530 (2007-2008) (noting that "MySpace.com hosts over 175 million registered profiles worldwide and more individuals visit MySpace's site that view Google.com").

MySpace's users create personal profiles, which appear on the website MySpace.com. App. 43a. MySpace users are generally able to search and view the personal profiles of other users and communicate with other users through weblog postings, emails, and instant messages, all of which are facilitated by and integrated into the MySpace.com website. App. 43a; see also App. 2a-3a (description of MySpace by Fifth Circuit).

To obtain a MySpace.com account and access the MySpace.com social network, a user need only navigate on the Internet to the MySpace.com website, click the button labeled "SIGN UP," and follow the resulting on-screen prompts. App. 42a-43a. The website asks the user to enter a name, email address, gender, country, postal code, date of birth, and password. *Ibid.* The information provided by the user need not be true or accurate, and MySpace does not attempt to verify it. *Ibid.* Although children under the age of 14 who enter their actual date of birth cannot create an account, it is a simple matter for a child who has been denied access to the site to reenter the same information with a false (and earlier) birth date, which will result in the child gaining an account and full access to the website. App. 43a.

Having created an account and logged on to MySpace for the first time (and every subsequent time), the user is encouraged by MySpace to enter specific additional personal information and thereby complete the user's profile. *Ibid.* Respondents actively encourage young children to join MySpace.com and they direct these children to communicate and socialize with complete strangers. App. 55a. MySpace's website is designed so that

users can easily interact with one another and access one another's profiles. App. 43a. The site facilitates interaction among its users by providing integrated weblog, email, and instant messaging functions, which allow communication among users. *Ibid.*

In the summer of 2005, 13-year-old Julie Doe created a profile on MySpace.com. App. 54a.[2] Notwithstanding MySpace's ineffectual security protections and its restriction that only children 14 or older could use the site, Julie nevertheless easily created and used her profile. App. 43a, 54a.

Julie began to regularly use MySpace in February 2006. On April 6, 2006, only a few weeks after Julie first started to routinely use MySpace, Pete Solis, a 19-year-old adult MySpace user contacted Julie via her MySpace profile and began to befriend her. *Id.* Julie and Solis then engaged in a series of communications over the MySpace.com website. App. 54a-55a. After several weeks of emails and online chatting via MySpace, Solis convinced then 14-year-old Julie to meet him in a parking lot after school on May 12, 2006. Solis then sexually assaulted Julie. *Ibid.* Julie's mother, Jane, called the local police department the next day. *Ibid.*

Solis later confessed to sexually assaulting Julie. *Ibid.* Solis stated that he used MySpace to initiate contact with Julie and explained how he used MySpace to gain Julie's trust and to persuade her to

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[2] Unless otherwise stated, the underlying facts recited in the statement are drawn from Doe's complaint. Because the district court dismissed this case under Federal Rule of Civil Procedure 12(c), all of the complaint's allegations are accepted as true. *Bridge* v. *Phoenix Bond & Indem. Co.*, 128 S.Ct. 2131, 2135 (2008).

give him personal information. *Ibid.* Solis was indicted and charged with sexual assault under Texas law, a second-degree felony punishable by up to 20 years in prison. App. 55a.

What happened to Julie Doe, however, is not unique. Both before and after Julie Doe was assaulted, there have been repeated incidents of children being assaulted or raped by adults who used MySpace to find and target their victims. App. 46a-49a. MySpace and News Corp. were fully aware of these incidents. App. 55a-56a. In 2007, MySpace used software databases of registered sex offenders to see how many of offenders had profiles on MySpace. Duncan, MySpace Is Also Their Space: Ideas for Keeping Children Safe from Sexual Predators on Social-Networking Sites, 96 Ky. L.J. 527, 541 (2007-2008). MySpace publicly acknowledged that it found approximately 29,000 registered sex offenders had profiles on its website. *Ibid.*

On September 26, 2006, Julie's mother, Jane Doe, individually and as next friend of Julie Doe, sued MySpace and News Corporation in New York state court. App. 41a. Jane claimed that Julie's injuries were caused by the negligence and gross negligence of MySpace and News Corp. App. 56a-59a.[3] Jane alleged that MySpace and News Corp. were negligent because they "publicly tout[ed] the effectiveness of their security measures and policies they knew or should have known were utterly ineffective in deterring the likelihood of danger and harm to 14-

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[3] Doe's complaint also contained claims for fraud and negligent misrepresentation. Doe abandoned these claims in the district court, and they are no longer at issue in this case. App. 6a, 33a-34a.

year-old Julie." App. 57a. MySpace and News Corp.'s "representations gave the sense of security when no [such] security exist[ed]." *Ibid.* Jane further alleged that respondents were negligent because they "fail[ed] to act to substantially decrease the likelihood of danger and harm to 14-year-old Julie upon gaining actual and constructive knowledge of the danger and harm." *Ibid.*

MySpace and News Corp. removed the case to the United States District Court for the Southern District of New York, which subsequently transferred the case to the United States District Court for the Western District of Texas. MySpace and News Corp. moved to dismiss Jane Doe's claims under Federal Rule of Civil Procedure 12(b)(6) on the grounds that Doe's claims were barred under 47 U.S.C. §230 and that neither MySpace nor News Corp. owed a duty of care to Jane or Julie under Texas law.

Section 230 of the Communications Decency Act provides that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." 47 U.S.C. §230(e)(3). Respondents argued that Doe's claims were inconsistent with §230(c)(1) and §230(c)(2)(A). Section 230(c)(1) provides in pertinent part: "No provider . . . of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. §230(c)(1). Section 230(c)(2)(A) states that "[n]o provider . . . of an interactive computer service shall be held liable on account of . . . any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene,

lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable." 47 U.S.C. §230(c)(2)(A).

The district court held that Doe's negligence and gross-negligence claims were inconsistent with both provisions of §230(c) relied on by MySpace. It was undisputed that MySpace is an "interactive computer service" for purposes of §230(c). App. 21a. The disputed issue, with respect to §230(c)(1), was whether the Doe's claims "treated [MySpace] as the publisher or speaker of any information provided by another information content provider."

The district court claimed to follow *Zeran* v. *America Online, Inc.*, 129 F.3d 327 (CA4 1997), in holding that Doe's claims were inconsistent with §230(c)(1). App. 23a-25a. *Zeran* held that "§ 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service." 129 F.3d, at 330. The district court found *Zeran* applicable because, in its view, Doe sought "to impose tort liability on MySpace, a company that functions as an intermediary by providing a forum for the exchange of information between third party users." App. 25a. The court also noted that its decision was motivated, at least in part, by the fact that Julie Doe had lied about her age to MySpace. App. 19a, 28a-29a.

Doe argued that *Zeran* and its progeny were inapplicable and her claims were not barred. Doe explained that her claims did not treat MySpace as a publisher because the alleged tortious conduct was MySpace's decision to not use adequate safety measures or give proper warnings before encouraging children to communicate with adult strangers. Doe further explained that her claims were completely

unrelated to the content of the communications between Solis and Julie Doe. Doe asserted that MySpace could be held liable under traditional state-law tort duties, just as a bar might be held liable for not taking reasonable steps to prevent the entry of underage children or a brick-and-mortar social club might be held responsible for a sexual assault that resulted from inadequate security or lighting, regardless of any speech that may have incidentally been involved. The district court rejected this argument and said that Doe's claims were "directed toward MySpace in its publishing, editorial, and/or screening capacities" because, in its view, Doe's claims relied on the fact that MySpace had published the communications. App. 27a-28a.

The district court also provided two alternative bases for its dismissal of Doe's claims. First, the court held that §230(c)(2)(A) bars claims "based on [MySpace's] efforts to self-regulate material." App. 28a. Based on its misreading of §230(c)(2)(A), the court held that "[t]o the extent Plaintiffs seek to hold MySpace liable for ineffective security measures and/or policies relating to age verification, the Court alternately finds such claims are barred under § 230(c)(2)(A)." App. 28a. Second, the Court held that MySpace had no duty under Texas law to protect children from online sexual predators who use MySpace's website and that it did not even have a duty "to institute reasonable safety measures on its website." App. 32a.

The United States Court of Appeals for the Fifth Circuit affirmed the district court's dismissal of Doe's negligence and gross-negligence claims. App. 1a-17a. The Fifth Circuit held that Doe's claims were inconsistent with §230(c)(1). App. 6a. The court began by noting as did the district court that Julie

had lied about her age to MySpace. App. 3a. The court then explained that "[c]ourts have construed the immunity provisions in § 230 broadly in all cases arising from the publication of user-generated content." App. 8a. The court compared Doe's claims to the claims asserted in *Zeran* and *Green* v. *America Online*, 318 F.3d 465, 471 (CA3 2003), and held that Doe's claims were barred for the reasons explained in those cases. App. 9a-12a.

The court explained that the Does' "claims are barred by the [Communications Decency Act], notwithstanding their assertion that they only seek to hold MySpace liable for its failure to implement measures that would have prevented Julie Doe from communicating with Solis. Their allegations are merely another way of claiming that MySpace was liable for publishing the communications and they speak to MySpace's role as a publisher of online third-party-generated content." App. 12a.[4] The Court concluded that Doe's claims were "barred by the CDA, which prohibits claims against Web-based interactive computer services based on their publication of third-party content." App. 17a (citing 47 U.S.C. §230(c)(1), (e)(3)).[5]

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[4] The Fifth Circuit opinion incorrectly suggests that there were multiple plaintiffs when it refers to "the Does' claims." See, *e.g.*, App. 6a. There is only one plaintiff in this case, the petitioner Jane Doe, who brought claims both in her individual capacity and on behalf of her minor daughter.

[5] Because the Fifth Circuit held that Doe's claims were inconsistent with §230(c)(1), the Court did not address whether Doe's claims were also inconsistent with 47 U.S.C. §230(c)(2) or whether Doe's claims were viable under Texas law. App. 17a.

REASONS FOR GRANTING THE PETITION

I. THE COURTS ARE IN CONFLICT OVER THE PROPER APPLICATION OF §230, WITH SEVERAL ERRONEOUSLY EXPANDING IT, IN INCONSISTENT WAYS, TO BROADLY PREEMPT CLAIMS THAT CONGRESS NEVER INTENDED TO FORECLOSE.

The Fifth Circuit in this case held that Doe's negligence and gross-negligence claims were inconsistent with §230(c)(1), App. 6a, which provides that "[n]o provider or user of an interactive computer service shall be *treated as the publisher or speaker* of any information provided by another information content provider." 47 U.S.C. §230(c)(1) (emphasis added). That holding conflicts with the Seventh Circuit's interpretation of §230(c)(1), which correctly recognizes that §230(c)(1) provides, at most, a limited immunity, from claims that bear no resemblance to Doe's. Other courts are also in conflict with the Seventh Circuit's correct, limited view of §230(c)(1), and the Fifth Circuit's expansion of §230(c)(1)'s purported immunity goes beyond even what most of those courts have been willing to recognize.

A. As the Seventh Circuit Recognizes, §230 Only Preempts a Limited Range of Tort Claims Against Interactive Computer Services Like MySpace.

When Congress passed the Communications Decency Act, Congress was focused on protecting children from harms they might encounter on the Internet. See Pub. L. No. 104-104, Title V, 110 Stat. 56 (1996); H.R. Rep. No. 104-458, at 81-91 (1996); S. Rep. No. 104-230, at 187-193 (1996); S. Rep. No. 104-23, at 9 (1995); 141 Cong. Rec. S8080 (daily ed. June 9, 1995) (statement of Sen. Exon) ("The fundamental

purpose of the Communications Decency Act is to provide much needed protection for children."); 141 Cong. Rec. S1953 (daily ed. Feb. 1, 1995) ("Once [the CDA is] passed, our children and families will be better protected from those who would electronically cruise the digital world to engage children in inappropriate communications and introductions."); 141 Cong. Rec. H8471 (daily ed. Aug. 4, 1995) (statement of Rep. Cox) ("The Cox-Wyden amendment [to the CDA] is a thoughtful approach to keep smut off the [Internet] without government censorship."). In particular, Congress intended to protect interactive computer services "by allowing them to perform some editing on user-generated content without thereby becoming liable for all defamatory or otherwise unlawful messages that they didn't edit or delete. In other words, Congress sought to immunize the removal of user-generated content, not the creation of content." *Fair Housing Council of San Fernando Valley* v. *Roommates.com, LLC*, 521 F.3d 1157, 1163 (CA9 2008) (en banc).

Section 230 of the Communications Decency Act preempts state-law causes of action that are inconsistent with its provisions. 47 U.S.C. §230(e)(3); *Doe* v. *GTE Corp.*, 347 F.3d 655, 658 (CA7 2003). The Seventh Circuit has "questioned whether § 230(c)(1) creates any form of 'immunity,'" as it "does not mention 'immunity' or any synonym" and recognized that "§ 230(c) as a whole cannot be understood as a general prohibition of civil liability for web-site operators and other online content hosts." *Chicago Lawyers' Committee For Civil Rights Under The Law, Inc.* v. *Craigslist, Inc.*, 519 F.3d 666, 669-670 (CA7 2008) (quoting *GTE*, 347 F.3d, at 655).

When Congress enacted §230(c), it "did not intend to grant a vast, limitless immunity." *Chicago Lawyers' Committee For Civil Rights Under The Law, Inc.* v. *Craigslist, Inc.*, 461 F.Supp.2d 681, 696 (ND Ill. 2006), aff'd, 519 F.3d 666 (CA7 2008). Rather, it "enacted Section 230(c) specifically to overrule the court decision in *Stratton Oakmont, Inc.* v. *Prodigy Services Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995)," which held an Internet service provider liable for defamation because it had exercised editorial control regarding which posts it allowed to remain on an electronic bulletin board it administered. *Ibid.* (citing H.R. Conf. Rep. No. 104-458, at 194 (1996)); see also *Batzel* v. *Smith*, 333 F.3d 1018, 1029 (CA9 2003). And "[l]imiting the immunity afforded under Section 230 to those claims that require 'publishing' as an essential element—as opposed to any cause of action—gives effect to the different language in Sections 230(c)(1) and (c)(2)." *Craigslist*, 461 F.Supp.2d, at 697.

The term "publisher," as used in §230(c)(1), draws its meaning from the common-law of defamation. *Zeran* v. *America Online, Inc.*, 129 F.3d 327, 334 (CA4 1997) (citing *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 783 (1952), and noting that the common-law definition of "publisher" should control because to interpret the term otherwise would conflict with the obvious legislative purpose of the CDA); *Barrett* v. *Rosenthal*, 40 Cal.4th 33, 47, 146 P.3d 510, 518 (2006) (noting that "publication is an element of defamation"); *id.*, at 49, 146 P.3d, at 520 ("Those terms [publisher and speaker], employed in §230(c)(1), are drawn from the law of defamation."); *Dimeo* v. *Max*, 433 F.Supp.2d 523, 528 (ED Pa. 2006) (indicating that §230(c)(1) grants immunity from

claims seeking to impose the "traditional treatment of publishers under statutory and common law").[6]

By its plain terms, §230(c)(1) and (e)(3) grant immunity only from a specific class of claims, namely those claims that premise liability on treating a qualifying entity as if it were the speaker or publisher of information that originated from another source. *Universal Commc'n Systems, Inc.* v. *Lycos, Inc.*, 478 F.3d 413, 422 (CA1 2007) (stating that treating an entity as a publisher in §230 means that "any liability against [the entity] must be premised on *imputing to it the alleged misinformation*, that is, on treating it as the publisher of that information") (emphasis added). Thus, §230(c)(1) immunizes an interactive-computer-service provider from claims that would treat the provider as the person who published, decided to publish, withdrew, postponed publication of, or altered defamatory, offensive, or otherwise harmful material originating from a third party. *Zeran*, 129 F.3d, at 330. It is a content-based immunity that immunizes claims seeking to impose liability because of harm caused by the content of a particular publication. Or, in other words, it bars state-law claims against providers of interactive computer services from claims that seek to put the provider in the shoes of the original speaker.

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[6] *Morissette* v. *United States*, 342 U.S. 246, 263 (1952) ("[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word . . . .").

B. State and Federal Courts Have, in Inconsistent Ways and in Conflict with the Seventh Circuit's Interpretation, Expanded the Preemptive Scope of §230.

While the Seventh Circuit correctly recognizes §230's limited scope, numerous other courts—although often paying lip service to the statute's limitations—have repeatedly expanded the preemptive scope of §230 far beyond what Congress ever intended. Rustad & Koenig, Rebooting Cybertort Law, 80 Wash. L. Rev. 335, 371 (2005) (explaining how the "judiciary . . . has radically expanded § 230"); Lidsky, Silencing John Doe: Defamation & Discourse in Cyberspace, 49 Duke L.J. 855, 871 (2000) ("Both the title of the [Communications Decency] Act and its legislative history suggest that Congress meant to establish a policy that [interactive service providers] would not be subject to liability as 'publishers' of content posted by third parties just because they exercise a limited degree of editorial control over content. But court decisions interpreting subsection 230(c) have broadened its ambit far beyond merely protecting "Good Samaritan" editorial control."); but see *Craigslist, Inc.*, 461 F.Supp.2d at 693-695 (rejecting as unpersuasive "*Zeran* and the essentially uniform body of case law" interpreting the scope of §230(c)(1)).[7]

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[7] See also *Doe* v. *America Online, Inc.*, 783 So.2d 1010, 1028 (Fla. 2001) (Lewis, J., dissenting); Mann & Belzley, The Promise of Internet Intermediary Liability, 47 Wm. & Mary L. Rev. 239, 260 (2005) (noting that because the courts have "broadly" interpreted, *inter alia*, the immunity provisions of the Communications Decency Act, they have "the potential to provide considerable protection for intermediaries, even beyond the context that motivated their enactment"); Patel, Immunizing Internet Service Providers From Third Party

Although Congress stated only that providers or interactive computer services should not be treated as publishers or speakers of content provided by third parties, 47 U.S.C. §230(c)(1), and preempted state-law claims that were inconsistent with that provision, courts have repeatedly broadened the preemptive scope of §230 to bar any claims against service providers that are in any way causally related to third-party speech. Moreover, even among the cases that conflict with the Seventh Circuit's limiting interpretation of §230 by applying the statute expansively, there are marked inconsistencies in the application of §230 preemption that bring those cases into conflict with each other.

The overbroad interpretations of §230(c) began with *Zeran* v. *America Online, Inc.*, 129 F.3d 327 (CA4 1997). In *Zeran*, the Fourth Circuit applied §230(c)(1) immunity to bar claims stemming from harm (including death threats and derogatory phone calls) caused by the publication of false information posted on an Internet bulletin board stating that the plaintiff was selling t-shirts with offensive slogans referring to the Oklahoma City bombings. 129 F.3d, at 329, 332. The court broadly stated that §230

Internet Defamation Claims: How Far Should Courts Go?, 55 Vand. L. Rev. 647 (2002); Sheridan, *Zeran v. AOL* and the Effect of Section 230 of the Communications Decency Act Upon Liability for Defamation on the Internet, 61 Alb. L. Rev. 147, 168 (1997); Langdon, Note, The Communications Decency Act § 230: Make Sense? Or Nonsense?—A Private Person's Inability to Recover if Defamed in Cyberspace, 73 St. John's L. Rev. 829 (1999); Cordero, Comment, Damnum Absque Injuria: *Zeran v. AOL* and Cyberspace Defamation Law, 9 Fordham Intell. Prop. Media & Ent. L.J. 775 (1999); Wiener, Negligent Publication of Statements Posted on Electronic Bulletin Boards: Is There Any Liability Left After *Zeran*?, 39 Santa Clara L. Rev. 905 (1999).

"creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service." 129 F.3d, at 330. *Zeran* further explained that what §230 did was to preclude

> "courts from entertaining claims that would place a computer service provider in a publisher's role. Thus, lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred." *Zeran*, 129 F.3d, at 330.

See also *Barrett*, 40 Cal.4th, at 49, 146 P.3d, at 519 (explaining that "[s]ection 230(c)(1) is concerned with liability arising from information provided online"). Although *Zeran* expanded §230(c)(1) beyond what Congress initially intended, see Sheridan, *supra*, 61 Alb. L. Rev., at 168, the court still kept the focus on whether a state-law claim attempted to treat the service provider as though it was the publisher of the allegedly tortious communications.

Courts deciding subsequent cases, however, have broadened to different degrees the preemptive scope of §230 beyond *Zeran*'s bounds. For example, some courts have stayed within the bounds of *Zeran*'s analysis. The Tenth Circuit has held that §230(c)(1) immunity applied to claims stemming from publication and negligent manipulating, altering, and changing of false stock-price and share-volume information. *Ben Ezra, Weinstein, & Co.* v. *America Online Inc.*, 206 F.3d 980, 983 (CA10 2000). Similarly, the First Circuit in a case in which it correctly noted that §230(c)(1) only barred claims that imputed to the service provider the allegedly tortious communications, held that state-law

securities and cyberstalking claims against a service provider were barred because the plaintiff's claims were "ultimately alleging that the construct and operation of Lycos's web sites contributed to the proliferation of misinformation" and that Lycos's decision not to reduce misinformation by changing its web site policies was as much an editorial decision with respect to that misinformation as a decision not to delete a particular posting." *Lycos, Inc.*, 478 F.3d, at 422. Similarly, the California Supreme Court has followed *Zeran* and held that §230 barred plaintiffs' state-law defamation claims arising from the defendants' intentional and conscious decision to republish and to distribute defamatory statements made by others. *Barrett*, 40 Cal.4th, at 63, 146 P.3d, at 529. In each of these cases, the barred claims were premised on treating the defendant as the original speaker of the allegedly tortious communications.

Other courts, however, have broadened the preemptive scope of §230 even further to cover not only causes of action that treat service providers as though they were the publisher or speaker of tortious communications but also claims that allege that the service providers failed to employ proper safety measures to protect the plaintiffs from the known and foreseeable harms of third parties using their services. The Florida Supreme Court held in *Doe* v. *America Online, Inc.*, that §230 preempted a plaintiffs' claims based on AOL's transmission of advertisements for child pornography involving the plaintiff's children. 783 So.2d, at 1017. The court explained that the claims were barred because "[i]t is precisely the liability based upon negligent failure to control *the content* of users' publishing of allegedly illegal postings on the Internet that is the gravamen

of Doe's alleged cause of action." *Ibid.* (emphasis added).

The Florida Supreme Court's decision took a new step in expanding the preemptive scope of §230. When Congress enacted §230 it intended to protect service providers from being held liable for the tortious communications of any of its users simply because it had voluntarily taken upon itself the task of attempting to remove some offensive or illegal content generated by its users. *Fair Housing Council of San Fernando Valley*, 521 F.3d, at 1163. In *Doe* v. *America Online*, however, the Florida Supreme Court held that a service provider that did absolutely nothing to prevent the use of its system to market child pornography was nevertheless protected from civil liability for its negligent failure to prevent its system from being used to market child pornography. In other words, the court expanded the preemptive scope of §230 to not only bar claims that attempt to treat the defendant service provider as a publisher of a third-party's statements but also to bar claims that the service provider failed to employ adequate safeguards to protect individuals from illegal third-party communication. *Doe* v. *America Online*, 783 So.2d, at 1017; but see *id.*, at 1028 (Lewis, J., dissenting).

Similarly, the California Court of Appeals in *Gentry* v. *eBay, Inc.*, held that a plaintiff's claims that eBay failed to employ adequate safeguards to protect its users from fraudulent sales and marketing pitches made by other eBay users were barred by §230. 99 Cal.App.4th 816, 834-835, 121 Cal.Rptr.2d 703, 718 (2002). And in *Green* v. *America Online (AOL)*, the Third Circuit held that §230(c)(1) immunity applied to claims seeking redress for defamatory and harmful

content published in an chatroom—including claims that AOL "negligent[ly] fail[ed] to properly police its network" for tortious content transmitted by its users. 318 F.3d 465, 471-472 (CA3 2003).

Gentry, *Green*, and *Doe* v. *America Online* all broadened the preemptive scope of §230 to cover not only claims that directly treated the service providers as speakers but also claims that sought to hold the providers liable for their negligence in protecting their users from the known and foreseeable wrongful acts of other users. Thus, those cases represent a distinct group, providing immunity from a category of claims that §230 would not necessarily reach under other cases following *Zeran* more directly. However, although those cases expanded §230 farther than some of the earlier cases, they are still at least premised on the idea that the claims at issue sought to hold them liable for failing to control "the content" transmitted by third parties. *Doe* v. *America Online*, 783 So.2d, at 1017.

Craigslist expressly and deliberately broke with *Zeran* and its progeny. *Craigslist*, 461 F.Supp.2d, at 693-695. As *Craigslist* recognized, see *id.*, at 696, contrary to *Zeran*'s and its progeny's analysis, the purpose of §230(c) was to protect providers of interactive computer service from being held liable for having made some attempt to protect its users from third-party tortious conduct. See *Doe*, 783 So.2d, at 1028 (Lewis, J., dissenting) (explaining that *Zeran* and courts following it have "transform[ed] a statute intended to further and support responsible ISP efforts to protect children and the public from even questionably harmful and illegal materials into a statute which both condones and exonerates a flagrant and reprehensible failure to act by an ISP in

the face of allegedly specific, known dissemination of material unquestionably harmful to children").

C. The Fifth Circuit Expands the Preemptive Scope of §230 Beyond That of Any Other Case.

The Fifth Circuit's interpretation of what it means to "treat" a provider of interactive computer services as a speaker or publisher of another user's statements puts the Fifth Circuit's view of §230 into direct conflict with the Seventh Circuit's, and then goes well beyond even the broadest interpretation of §230 applied by other courts. Among the cases following *Zeran*, the Fifth Circuit's holding in this case aligns with *Gentry*, *Green*, and *America Online*—the cases that do not require the provider even to be treated as a speaker in order to escape liability—and then takes the further leap of expanding §230 immunity to cover claims that do not even depend on the content of the speech at issue. Because any tort claim involving communications in an Internet forum will necessarily involve speech in some form, applying §230, as the Fifth Circuit has done, to any claim that has any causal relationship to speech effectively expands §230 into the "general prohibition of civil liability" that the Seventh Circuit has explained it is not. *Craigslist*, 519 F.3d, at 669.

Failing to acknowledge *Craigslist*, the Fifth Circuit noted that courts construing 47 U.S.C. §230 have uniformly construed it "broadly." App. 8a.[8] *Cf.*

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[8] In the two Ninth Circuit cases cited by the Fifth Circuit as broadly interpreting §230, *Carafano* v. *Metrosplash.com, Inc.*, 339 F.3d 1119 (2003), and *Batzel* v. *Smith*, 333 F.3d 1018 (2003), App. 8a-9a, the plaintiffs did not dispute that the claims "treated" interactive service providers as "publishers" or speakers. In both cases, the issue presented was whether the

Craigslist, 519 F.3d, at 670 ("[*Metro-Goldwyn-Mayer Studios Inc.* v. *Grokster, Ltd.*, 545 U.S. 913 (2005)] is incompatible with treating § 230(c)(1) as a grant of comprehensive immunity from civil liability for content provided by a third party."). The Fifth Circuit misconstrued §230(c)(1) so that it not only bars state-law claims that treat MySpace as a publisher or speaker of a third-party's content, it also effectively bars any claim that is any way causally connected to a third party's speech, even if the claims do not treat the provider as the publisher of that speech. App. 11a-12a.[9] The district court correctly

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interactive service providers were also information content providers as well, and thus not entitled to immunity under §230(c)(1). See *Carafano*, 339 F.3d, at 1120 (holding that §230(c)(1) immunized the defendant from liability for claims stemming from the publication of "false content in a dating profile provided by someone posing as another person" because it did not create in whole or in part the content at issue); *Batzel*, 333 F.3d, at 1026-1027 (holding that claims seeking redress for harms stemming from the selection and publication of allegedly defamatory e-mail were barred by §230(c)(1) because defendant did not help create the e-mails). The Ninth Circuit has subsequently upheld the results in those cases, although it has taken the opportunity to "clarify" the basis of both decisions. *Fair Housing Council of San Fernando Valley*, 521 F.3d, at 1170-1171.

[9] Respondents and their supporting *amici* in the Fifth Circuit expressly asked the court to construe §230 to cover any claims causally related to any third-party communication. In the court of appeals, MySpace argued that §230(c)(1) "bars claims filed against 'interactive computer services' based on their publication of third-party content or on harms flowing from the publication of that content." Brief of Appellees at 16 (emphasis added); see also Brief of *Amici Curiae*, at 6 ("Because Plaintiffs seek to hold MySpace liable for harm allegedly arising from exchanges of information that originated entirely from its users, Section 230 bars their claim.").

noted that "[i]f MySpace had not published communications between Julie Doe and Solis, . . . they would never have met and the sexual assault would never have occurred." App. 27a. But from this mere causal connection, the district court and the court of appeals incorrectly reached the unsupported conclusion that Doe's claims necessarily treated MySpace as a publisher.

Nothing in §230(c)(1), the other cases interpreting §230(c)(1), or any other authority indicates that §230(c)(1) immunity is so expansive. Had Congress desired to impose such a standard it easily could have done so by stating: No interactive service provider or user shall be liable for any claim that is related to the publication of information provided by another user. Congress, however, expressly limited §230(c)(1) to bar only those claims that "treat" the defendant as the "publisher." 47 U.S.C. §230(c)(1); see *Lycos, Inc.*, 478 F.3d, at 422. Those terms, by their plain or legal meanings, do not impose a broad "related to" or causal-chain immunity. Rather they at most preempt only those claims that are based on MySpace's exercise of a publisher's traditional editorial functions, such as editing, altering, or deciding whether or not to publish certain material or on the publication of content that is intrinsically tortious (*e.g.*, fraudulent statements, defamatory statements, etc.).

Doe's claims, however, only seek to hold MySpace liable for its failure to institute reasonable safety measures on its website and its failure to provide adequate warnings to its underage users (and their parents)—a concept that is distinct from whether MySpace published third-party speech. Thus, Doe's claims are not preempted by §230(e)(3) because they

are not inconsistent with §230(c)(1). Doe's claims do not impute Solis's communications to MySpace. Nor do they attempt to hold MySpace liable for deciding whether to publish the communications between Solis and Julie. Rather, Doe's claims are based on the fact that once MySpace chose to encourage children to communicate with adult strangers via its website, it decided not to put into place adequate safety measures or warnings. In other words, Jane Doe's claims are not premised on "treat[ing]" MySpace as a "speaker or publisher" of a third party's speech or content because MySpace's negligent acts and omissions did not relate in any way to an editor's traditional functions. Doe's claims do not assert that MySpace is liable for Julie's injuries because of how it carried out its editorial functions. In fact, Doe's claims are completely unrelated to the content of the communications between Julie and Solis. Instead, Doe's claims are premised solely on MySpace's failure to provide adequate safeguards and warnings for its underage users. Thus, MySpace is ineligible for §230(c)(1) immunity, such as it is, in this case.

D. The Cases That Inconsistently Construe the Preemptive Scope of §230 All Fail to Construe the Statute Narrowly in Light of the Presumption Against Preemption.

The decisions of the courts that broadly construe §230, including the Fifth Circuit's decision in this case, ignore the well-established principles that there is a presumption against preemption and that preemption provisions are thus to be construed narrowly. *Bates* v. *Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005) (stating that because "the States are independent sovereigns in our federal system,

we have long presumed that Congress does not cavalierly pre-empt state-law causes of action") (internal quotation marks omitted); *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 485 (1996) (stating that courts have "long presumed that Congress does not cavalierly pre-empt state-law causes of action"); *Montalvo* v. *Spirit Airlines*, 508 F.3d 464, 474 (CA9 2007) ("Preemption provisions are narrowly and strictly construed."); *N.Y. State Conf. of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 514 U.S. 645, 654 (1995); *White Buffalo Ventures, LLC* v. *Univ. of Tex. at Austin*, 420 F.3d 366, 370 (CA5 2005) ("Preemption radically alters the balance of state and federal authority, so the Supreme Court has historically refused to impose that alteration interstitially. The Court has expressed this principle as a presumption against preemption of state law."); *Branche* v. *Airtran Airways, Inc.*, 342 F.3d 1248, 1256 (CA11 2003) ("[I]n cases where the harm alleged is of a type that traditionally has been within the remedial province of the states . . . 'express preemption clauses must be construed narrowly.'") (quoting *Irving* v. *Mazda Motor Corp.*, 136 F.3d 764, 767 (CA11 1998)).

Given that the decisions fail to consider the presumption against preemption, they also fail to acknowledge that presumption is particularly strong when the state law to be preempted falls within the traditional regulatory authority of the states. *Bates*, 544 U.S., at 449; see also *Medtronic, Inc.*, 518 U.S., at 485; *Hillsborough County, Fla.* v. *Automated Medical Laboratories, Inc.*, 471 U.S. 707, 718 (1985); *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (explaining that the inquiry into preemption begins by assuming that "the historic police powers of the States [a]re not to be superseded . . . unless that

was the clear and manifest purpose of Congress"); *Anderson* v. *Sara Lee Corp.*, 508 F.3d 181, 192 (CA4 2007) (explaining that "[a]s a general proposition, the presumption that Congress did not intend to preempt state law is especially strong when it has legislated in a field which the States have traditionally occupied, such as protecting the health and safety of their citizens" and that "the presumption is stronger still against preemption of state remedies, like tort recoveries, when no federal remedy exists") (internal quotations omitted).

The Fifth Circuit's overly broad interpretation of §230, however, impinges on two distinct areas of traditional state regulation: (1) protection of child welfare and (2) matters of health and safety. *Maryland* v. *Craig*, 497 U.S. 836, 855 (1990) (noting "the State's traditional and 'transcendent interest in protecting the welfare of children'") (quoting *Ginsberg* v. *New York*, 390 U.S. 629, 640 (1968)); *Hillsborough County, Fla.*, 471 U.S., at 715-716 (stating that health and safety matters have historically been regulated by the states through their police power). Had the Fifth Circuit and other courts that have construed §230 properly acknowledged the presumption against preemption, perhaps they would have construed the statute in accordance with the words that Congress actually used, rather than adopt the overly broad interpretations they have chosen.

II. THE PREEMPTIVE SCOPE OF §230 PRESENTS AN IMPORTANT QUESTION THAT MERITS THIS COURT'S REVIEW.

The scope of the preemptive effect of §230 is an important question that warrants review by this Court. The broad preemption of state law imposed by the lower courts' overbroad interpretation of §230

hampers the ability of state and local governments to regulate some of the most important and largest Internet businesses operating in the United States. For example, the problem of adults preying on children on social-networking websites, including MySpace.com, has become rampant. As one commentator noted, "MySpace has become a one-stop shopping catalog for child predators." Groppe, A Child's Playground or a Predator's Hunting Ground?—How to Protect Children on Internet Social Networking Sites, 16 CommLaw Conspectus 215, 226 (2007). Even MySpace, after Julie was assaulted by Solis, has acknowledged the problems of online sexual predators using its website to hunt for victims and has only now instituted some limited measures to protect its underage users. Brian Stelter, N.Y. Times, MySpace Agrees to Youth Protections, http://www.nytimes.com/2008/01/14/technology/14cnd-myspace.html (last visited Sept. 9, 2008) (MySpace agreed to "classify as private all profiles of users under the age of 18" and "organize a task force . . . to review and develop online safety tools," including age verification).

State attorneys general have been pressuring MySpace to make changes to its website to make it safer for children to use. App. 49a-51a, 65a-77a. While MySpace has voluntarily agreed to make certain changes, if MySpace fails to follow through, state and local governments will have little ability to regulate MySpace's activities. See Recent Case, Doe v. MySpace, Inc., 474 F.Supp.2d 843 (WD Tex. 2007), 121 Harv. L. Rev. 930 (2008) (noting that the district court's broad interpretation of §230 will interfere with the ability of state and local governments to regulate MySpace in order to protect children from online sexual predators). Furthermore, other courts

have begun following the lower court's decision in this case to dismiss the claims of other children who were assaulted or raped by adults who used MySpace to find and lure their victims. See 11/19/07 Notice of Ruling, *Doe* v. *MySpace, Inc.*, Nos. SC092422, SC092421, SC092423, SC092424, (Cal. Super. Ct. 2007).

Similarly, online auction sites like eBay, which have grown into a multibillion dollar business, are also hiding behind §230 to avoid any responsibility for protecting users from fraud perpetrated by individuals who use those sites to hawk their goods or to illegally merchandise counterfeit goods. See, *e.g.*, *Gentry*, 99 Cal.App.4th, at 828-831, 121 Cal.Rptr.2d, at 712-715. Absent review from this Court, it is likely that §230 will stray further from the limited protection that Congress intended in 1996—years before websites like MySpace and eBay even existed.

The problem of overbroad preemption under §230 is not limited to unnecessarily restraining the abilities of state and local government to exercise their police power within their traditional regulatory realm. Courts broadly interpreting §230 routinely state that injured parties may still seek relief from the often-anonymous and unknown individuals who hurt them and that it is the responsibility of parents and not the Internet intermediaries to protect children from online predators. See, *e.g.*, App 10a. But the lower courts' cursory and unsupported assertions in this regard ignore the fact that the individual predators are "typically far beyond the reach of conventional law," Lichtman & Posner, Holding Internet Service Providers Accountable, 14 Sup. Ct. Econ. Rev. 221, 233 (2006), and that Internet

intermediaries like MySpace are often in the best position as the "least cost avoider" to prevent injuries like those suffered by Julie Doe and the other children who have been assaulted by adults using MySpace for their nefarious purposes. See *id.*, at 230; Rustad & Koenig, Rebooting Cybertort Law, 80 Wash. L. Rev. 335, 385-386 (2005); Mann & Bezley, The Promise of Internet Intermediary Liability, 47 Wm. & Mary L. Rev. 239, 249 (2005); Freiwald, Comparative Institutional Analysis in Cyberspace: The Case of Intermediary Liability for Defamation, 14 Harv. J.L. & Tech. 569 (2000-2001). Even MySpace has acknowledged that it should be held to the same standards of care as other businesses. Brian Stelter, N.Y. Times, MySpace Agrees to Youth Protections, http://www.nytimes.com/2008/01/14/technology/14cnd-myspace.html (last visited Sept. 9, 2008) (statement made by MySpace's chief security officer that "'[r]ather than treating the online and offline world differently, our goal has been, and will continue to be, to make our virtual neighborhoods as safe as our real ones'").

The principle underlying *Zeran*, and subsequent cases expanding the preemptive scope of §230, is that Internet intermediaries, like MySpace, had to be protected from liability if they were to survive. Mann & Belzley, The Promise of Internet Intermediary Liability, 47 Wm. & Mary L. Rev. 239, 261 (2005). But *Zeran*'s fears regarding potential liability are misplaced. *Ibid.* (explaining that broad interpretations of statutes immunizing Internet intermediaries share "the reflexive and unreflective fear that recognition of liability for intermediaries might be catastrophic to Internet commerce" and that "a myopic focus on the idea that the inherent passivity of Internet intermediaries makes it

normatively inappropriate to impose responsibility on them for the conduct of primary malfeasors"); *Fair Housing Council of San Fernando Valley*, 521 F.3d, at 1164 n.15 ("The Internet is no longer a fragile new means of communication that could easily be smothered in the cradle by overzealous enforcement of laws and regulations applicable to brick-and-mortar businesses.").

The Internet's "vast reach into the lives of millions is exactly why we must be careful not to exceed the scope of the immunity provided by Congress and thus give online businesses an unfair advantage over their real-world counterparts, which must comply with laws of general applicability." *Fair Housing Council of San Fernando Valley*, 521 F.3d, at 1164 n.15. Furthermore, uniformity in the interpretation of §230 is crucial because inconsistencies in how it is interpreted could lead to forum-shopping by litigants seeking to file in a jurisdiction in which the prevailing interpretation of §230 is most favorable. See *Barrett*, 40 Cal.4th at 58, 146 P.3d at 526. The Court should grant the petition and clarify that the preemptive scope of 47 U.S.C. §230 is limited only to claims that treat providers of interactive computer services as though they were speakers or publishers of illegal or improper statements.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 2008

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed May, 16, 2008]

No. 07-50345

JANE DOE, Individually and as next friend
of Julie Doe, a minor
Plaintiff – Appellant,

v.

MYSPACE INC; NEWS CORPORATION
Defendants – Appellees.

Appeal from the United States District Court
for the Western District of Texas

Before GARWOOD, CLEMENT and ELROD, *Circuit Judges.*

EDITH BROWN CLEMENT, *Circuit Judge*:

Jane and Julie Doe ("the Does") appeal the district court's dismissal of their claims for negligence and gross negligence, and its finding that the claims were barred by the Communications Decency Act ("CDA"), 47 U.S.C § 230, and Texas common law. For the following reasons, we affirm the decision of the district court.

I. FACTS AND PROCEEDINGS

MySpace.com is a Web-based social network. Online social networking is the practice of using a Web site

or other interactive computer service to expand one's business or social network. Social networking on MySpace.com begins with a member's creation of an online profile that serves as a medium for personal expression, and can contain such items as photographs, videos, and other information about the member that he or she chooses to share with other MySpace.com users. Members have complete discretion regarding the amount and type of information that is included in a personal profile. Members over the age of sixteen can choose the degree of privacy they desire regarding their profile; that is, they determine who among the MySpace.com membership is allowed to view their profile. Once a profile has been created, the member can use it to extend "invitations" to existing friends who are also MySpace.com users and to communicate with those friends online by linking to their profiles, or using e-mail, instant messaging, and blogs,[1] all of which are hosted through the MySpace.com platform.

Members can also meet new people at MySpace.com through user groups focused on common interests such as film, travel, music, or politics. MySpace.com has a browser feature that allows members to search the Web site's membership using criteria such as geographic location or specific interests. MySpace.com members can also become online "friends" with celebrities, musicians, or politicians who have created MySpace.com profiles to publicize their work and to interface with fans and supporters.

MySpace.com membership is free to all who agree to the Terms of Use. To establish a profile, users must

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[1] The term "blog" is a portmanteau of "Web log" and is a term referring to an online journal or diary.

represent that they are at least fourteen years of age. The profiles of members who are aged fourteen and fifteen are automatically set to "private" by default, in order to limit the amount of personal information that can be seen on the member's profile by MySpace.com users who are not in their existing friends network and to prevent younger teens from being contacted by users they do not know. Although MySpace.com employs a computer program designed to search for clues that underage members have lied about their age to create a profile on the Web site, no current technology is foolproof. All members are cautioned regarding the type of information they release to other users on the Web site, including a specific prohibition against posting personal information such as telephone numbers, street addresses, last names, or e-mail addresses. MySpace.com members are also encouraged to report inaccurate, inappropriate, or obscene material to the Web site's administrators.

In the summer of 2005, at age thirteen, Julie Doe ("Julie") lied about her age, represented that she was eighteen years old, and created a profile on MySpace.com. This action allowed her to circumvent all safety features of the Web site and resulted in her profile being made public; nineteen-year-old Pete Solis ("Solis") was able to initiate contact with Julie in April 2006 when she was fourteen. The two communicated offline on several occasions after Julie provided her telephone number. They met in person in May 2006, and, at this meeting, Solis sexually assaulted Julie.[2]

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[2] Julie's mother reported the assault to Austin, Texas police, who arrested Solis and charged him with second-degree sexual assault.

Julie's mother, Jane Doe, first sued MySpace, Inc., its parent company, News Corporation (collectively "MySpace"), and Solis in a Texas state court on her own behalf and on behalf of her daughter, alleging that MySpace failed to implement basic safety measures to prevent sexual predators from communicating with minors on its Web site. The Does' original petition asserted claims for fraud, negligent misrepresentation, negligence, and gross negligence against MySpace, and claims for sexual assault and intentional infliction of emotional distress against Solis. MySpace answered the petition and filed special exceptions, asserting among other things, that the CDA and Texas common law barred the Does' claims. The Does amended their petition, to which MySpace again specially excepted; thereafter, before any ruling on the special exceptions, the Does filed a motion for nonsuit which the court granted, dismissing the case without prejudice. The Does then refiled in New York state court, asserting the same claims against MySpace, but declining to name Solis as a defendant. MySpace immediately removed that case to the United States District Court for the Southern District of New York and moved simultaneously to transfer venue to the Western District of Texas and to dismiss for failure to state a claim. The district court in New York considered both motions and granted MySpace's motion to transfer venue, but declined to rule on the motion to dismiss, leaving it for the transferee court.

The district court in Texas then held oral argument on February 1, 2007, and decided MySpace's motion to dismiss in a written opinion. The district court construed MySpace's Rule 12(b)(6) motion to dismiss as a Rule 12(c) motion for judgment on the pleadings and considered the Does' most recent complaint, filed

on September 25, 2006 in the Bronx County court. In their complaint, the Does alleged:

> 8. To access the social network, one must create a MySpace account. In order to create a MySpace account, all one has to do is enter a name, email address, gender, country, and date of birth. . . . .
>
> 9. Once signed up, each MySpace user is given his or her own personal webpage to create. MySpace users are then prompted to post photographs and personal information on their webpage. Typically, a MySpace user's webpage is viewable by any other MySpace user. Further, any MySpace user can contact any other MySpace user through internal email and/or instant messaging on MySpace.[3]
>
> . . . .
>
> 11. The catalyst behind MySpace's amazing surge in popularity is their underage users demographic. According to MySpace, approximately 22 percent of MySpace visitors are minors, under the age of 18. MySpace actively and passively markets itself to minors.
>
> . . . .
>
> 27. In the summer of 2005, 14-year-old Julie created a profile on MySpace. At the time, Julie was only 13-years-old. Despite MySpace's supposed safety precautions and protections

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[3] Regarding the use of computers and internet sites, a "prompt" is defined as "a message or symbol from a computer system to a user, generally appearing on a display screen, requesting more information or indicating that the system is ready for user instructions." Dictionary.com, http://www.dictionary.reference.com/browse/prompt (last visited April 28, 2008).

> prohibiting anyone under 14-years-old from using MySpace, Julie was easily able to create a profile.
>
> . . . .
>
> 41. Defendants owed a legal duty to 14-year-old Julie to institute and enforce appropriate security measures and policies that would substantially decrease the likelihood of danger and harm that MySpace posed to her.

The district court in Texas dismissed with prejudice the Does' claims for negligence and gross negligence, finding that the claims were barred by the CDA and Texas common law. The Does voluntarily withdrew their claims for fraud and negligent misrepresentation; therefore, the district court dismissed those claims without prejudice. The Does now appeal the district court's dismissal of their claims for negligence and gross negligence, arguing that § 230(c)(1) of the CDA is inapplicable here because their claims do not implicate MySpace as a "publisher" protected by the Act and because MySpace not only published but was also partially responsible for creating the content of the information that was exchanged between Julie and Solis. Doe next argues that § 230(c)(2) does not immunize MySpace's failure to take reasonable steps to ensure minors' safety. The Does lastly apply the law of premises liability germane to owners of real property to publishers and Internet service providers operating in the virtual world of cyberspace to argue that the district court erred when it did not find a common-law duty to protect Julie. We hold, however, that the Does' claims of negligence are barred by § 230(c)(1) of the CDA.

II. STANDARD OF REVIEW

This Court reviews a district court's grant of judgment on the pleadings under Rule 12(c) *de novo*. *See Brittan Commc'ns Int'l Corp. v. Sw. Bell Tel. Co.*, 313 F.3d 899, 904 (5th Cir. 2002); *Hughes v. The Tobacco Inst., Inc.*, 278 F.3d 417, 420 (5th Cir. 2001). A motion for judgment on the pleadings under Rule 12(c) is subject to the same standard as a motion to dismiss under Rule 12(b)(6). *Johnson v. Johnson*, 385 F.3d 503, 529 (5th Cir. 2004) (citing *Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 313 n.8 (5th Cir. 2002)). "[T]he central issue is whether, in the light most favorable to the plaintiff, the complaint states a valid claim for elief." *Hughes*, 278 F.3d at 420 (internal quotations omitted). Although we must accept the factual allegations in the pleadings as true, *id.*, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1974 (2007).

III. DISCUSSION

In October 1998, Congress recognized the rapid development of the Internet and the benefits generated by Web-based service providers to the public. *See* 47 U.S.C. § 230(a) (acknowledging that "interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity" and have "flourished . . . with a minimum of government regulation"). In light of its findings, Congress enacted the CDA for several policy reasons, including "to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate

online material." *Id.* § 230(b)(4). To achieve that policy goal, Congress provided broad immunity under the CDA to Web-based service providers for all claims stemming from their publication of information created by third parties, referred to as the "Good Samaritan" provision. *Id.* § 230(c)(1) ("No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."). Indeed, "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." *Id.* § 230(e)(3).

Courts have construed the immunity provisions in § 230 broadly in all cases arising from the publication of user-generated content. *See, e.g.*, *Green v. Am. Online (AOL)*, 318 F.3d 465, 471 (3d Cir. 2003); *Carafano v. Metrosplash. com, Inc.*, 339 F.3d 1119, 1123–24 (9th Cir. 2003); *Batzel v. Smith*, 333 F.3d 1018, 1030–31 & n.19 (9th Cir. 2003); *Ben Ezra, Weinstein, & Co. v. Am. Online Inc.*, 206 F.3d 980, 984–86 (10th Cir. 2000); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330–31 (4th Cir. 1997). For example, the Ninth Circuit held that a Web-based dating-service provider was not liable when an unidentified party posted a false online personal profile for a popular actress, causing her to receive sexually explicit phone calls, letters, and faxes at her home. *Carafano*, 339 F.3d at 1122. Acknowledging that the immunity provision in § 230(c)(1) of the CDA causes "Internet publishers [to be] treated differently from corresponding publishers in print, television and radio," *id.* at 1122, the Ninth Circuit held that "[u]nder § 230(c), . . . so long as a third party willingly provides the essential published content, the interactive service provider receives full immunity

regardless of the specific editing or selection process." *Id.* at 1124.

Similarly, the Fourth Circuit dismissed a plaintiff's claims on the pleadings, holding that the CDA protects Web-based service providers from liability even after the provider is notified of objectionable content on its site. *See Zeran*, 129 F.3d at 333. The plaintiff in *Zeran* sued an Internet service provider for failing to remove upon notice a false advertisement offering shirts featuring tasteless slogans relating to the 1995 bombing of the Oklahoma City Federal Building and instructing interested buyers to call the plaintiff to place orders. *Id.* at 329. After analyzing the immunity provision of § 230, the Fourth Circuit wrote:

> If computer service providers were subject to distributor liability, they would face potential liability each time they receive notice of a potentially defamatory statement—from any party, concerning any message. . . . Because service providers would be subject to liability only for the publication of information, and not for its removal, they would have a natural incentive simply to remove messages upon notification, whether the contents were defamatory or not. Thus, like strict liability, liability upon notice has a chilling effect on the freedom of Internet speech. . . . Because the probable effects of distributor liability on the vigor of Internet speech and on service provider self-regulation are directly contrary to § 230's statutory purposes, we will not assume that Congress intended to leave liability upon notice intact.

Id. at 333.

Parties complaining that they were harmed by a Web site's publication of user-generated content have recourse; they may sue the third-party user who generated the content, but not the interactive computer service that enabled them to publish the content online. *See id.* at 330–31 ("None of this means, of course, that the original culpable party who posts defamatory messages would escape accountability. . . . Congress made a policy choice, however, not to deter harmful online speech through the separate route of imposing tort liability on companies that serve as intermediaries for other parties' potentially injurious messages.").

The Does appear to agree with the consensus among courts regarding the liability provisions in § 230(c)(1). They argue, however, that their claims against MySpace do not attempt to treat it as a "publisher" of information; therefore, they argue that § 230 does not immunize MySpace from their claims and state tort law applies in full effect. The Does attempt to distinguish their case from *Carafano*, *Zeran*, and other contrary authority by claiming that this case is predicated solely on MySpace's failure to implement basic safety measures to protect minors. The district court rejected the Does' argument, stating:

> The Court, however, finds this artful pleading to be disingenuous. It is quite obvious the underlying basis of Plaintiffs' claims is that, through postings on MySpace, Pete Solis and Julie Doe met and exchanged personal information which eventually led to an in-person meeting and the sexual assault of Julie Doe. If MySpace had not published communications between Julie Doe and Solis, including personal contact information, Plaintiffs assert they never

> would have met and the sexual assault never would have occurred. No matter how artfully Plaintiffs seek to plead their claims, the Court views Plaintiffs' claims as directed toward MySpace in its publishing, editorial, and/or screening capacities.

Doe v. MySpace, Inc., 474 F. Supp. 2d 843, 849 (W.D. Tex. 2007).

The Does do not present any caselaw to support their argument. In fact, they rely upon the same line of cases listed above but point to § 230(c)(1)'s grant of immunity to publishers of third-party content as evidence that their claims are somehow different. Other courts, however, have examined pleadings similar to the Does' and have reached the same conclusion as the district court. For example, in *Green*, the plaintiff sued a Web-based service provider after he received a computer virus from a third party and endured derogatory comments directed at him by others in an online "chat room." 318 F.3d at 469. He made a failure-to-protect argument similar to the Does', claiming that "AOL waived its immunity under [§] 230 by the terms of its membership contract with him and because AOL's Community Guidelines outline standards for online speech and conduct and contain promises that AOL would protect [him] from other subscribers." *Id.* at 471. The Third Circuit, however, dismissed the claims as barred by § 230, after recharacterizing the plaintiff's claims:

> There is no real dispute that Green's fundamental tort claim is that AOL was negligent in promulgating harmful content and in failing to address certain harmful content on its network. Green thus attempts to hold AOL

> liable for decisions relating to the monitoring, screening, and deletion of content from its network—actions quintessentially related to a publisher's role. Section 230 "specifically proscribes liability" in such circumstances.

Id. (quoting *Zeran*, 129 F.3d at 333).

Green demonstrates the fallacy of the Does' argument. Their claims are barred by the CDA, notwithstanding their assertion that they only seek to hold MySpace liable for its failure to implement measures that would have prevented Julie Doe from communicating with Solis. Their allegations are merely another way of claiming that MySpace was liable for publishing the communications and they speak to MySpace's role as a publisher of online third-party-generated content.

The Does further argue for the first time on appeal that MySpace is not immune under the CDA because it partially created the content at issue, alleging that it facilitates its members' creation of personal profiles and chooses the information they will share with the public through an online questionnaire. The Does also contend that MySpace's search features qualify it as an "information content provider", as defined in the CDA: "The term 'information content provider' means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." 47 U.S.C. § 230(f)(3).

Nothing in the record, however, supports such a claim; indeed, Julie admitted that she lied about her age to create the profile and exchanged personal information with Solis. In the February 1, 2007

hearing before the district court, the Does admitted that Julie created the content, disclosing personal information that ultimately led to the sexual assault, but stressed that their cause of action was rooted in the fact that MySpace should have implemented safety technologies to prevent Julie and her attacker from meeting:

THE COURT: I want to get this straight. You have a 13-year-old girl who lies, disobeys all of the instructions, later on disobeys the warning not to give personal information, obviously, [and] does not communicate with the parent. More important, the parent does not exercise the parental control over the minor. The minor gets sexually abused, and you want somebody else to pay for it? This is the lawsuit that you filed?

MR. ITKIN [Counsel for the Does]: Yes, your Honor.

. . . .

MR. ITKIN: The first point is we're not complaining about any of the content that was transmitted between Julie Doe and Pete Solis. Our complaint is [that] the two of them never should have been able to meet because MySpace could have implemented technology very simple and technologically—not simple but technologically and inexpensive age verification software that has been asked for by attorneys general before the lawsuit happened, or even done the things they did right after the filing of the lawsuit that would have prevented these two people from ever meeting. We wanted to keep the foxes out of the hen house. That's the first thing, your Honor, is that we're not complaining about the content.

Throughout the hearing, the Does stated they had one argument—that MySpace was negligent for not taking more precautions:

MR. ITKIN: Pete Solis is liable for an assault. But what we're trying to hold MySpace liable for isn't the publishing of a phone number but, rather, we're trying to hold MySpace responsible for not putting in the safety precautions to keep the two of them separated.

. . . .

THE COURT: Now, I've heard all of your arguments on the negligence and the duty. Now the duty is something that's bothering me and that's my next question to you. But as I read your pleadings, they are just wholly inapplicable to the Federal Rules of Procedure on fraud. You've got no specific fraud here. And on your negligent misrepresentation, that's just a rehash of what you're already doing. So we're really talking about one cause of action, and that is a negligence cause of action. You keep nodding. Do you agree with that?

MR. ITKIN: I think that is a fair recommendation, a fair statement.

. . . .

MR. ITKIN: Thank you. Your Honor we are not—and I want to be very clear about this. We are not complaining about any of the content that was exchanged between Julie Doe and Pete Solis. We understand that that is something we cannot complain about. Our complaint is only that these two should have never been allowed to find each other, anyways, if reasonable safety precautions were put in

place. And under congressional law and, we believe, Texas common law, that's enough to state a claim.

Although the Does' complaint alleged that MySpace allowed or encouraged members to post information *after* a member's profile had been created, counsel for the Does reiterated in the hearing time and again that they had no complaints or allegations regarding the content of the information posted by Julie or exchanged between Julie and Solis. It appears that the reference to MySpace's solicitation of information was solely used to set up the Does' argument that MySpace failed to protect Julie by declining to implement age-verification software:

THE COURT: But your client violated every single thing that MySpace says to do.

MR. ITKIN: Which is your Honor—and true. That is correct, your Honor. But I will say that that's a known risk to MySpace. And that's not just me saying it, that's the Attorney General saying it.

THE COURT: Everyone knows people lie. So therefore, should you be liable?

MR. ITKIN: No, your Honor. But when you know of the risk and you know that the people—there's potential for lying, all you need to do is put some basic safety mechanisms in place to prevent—or to circumvent the lying.

THE COURT: So you've got the Attorney General of the United States saying . . . don't put your credit card on the internet, but you want them to do it to get a free space. That's one of the things.

MR. ITKIN: That's one of the things.

THE COURT: Then a driver's license. Do you know how many people I sentence here every Friday that have a fake driver's license?

MR. ITKIN: I can imagine a lot, your Honor.

. . . .

MR. ITKIN: What we really want, your Honor, is there's a company out there—I'll give you an example of one of the companies out there called Aristotle. Aristotle through public databases if you enter your name, your zip code, and your birth year can come back with, hey, this person's real; or you can enter an e-mail and have verification. So there's some things to do that are less intrusive as far as giving people your driver's license or your Social Security number.

. . . .

MR. ITKIN: Your Honor, because if [MySpace] had the age verification software in place, [Julie and Solis] never would have talked in the first place. They never would have known about each other.

At no time before filing their appeal in this Court did the Does argue that the CDA should not apply to MySpace because it was partially responsible for creating information exchanged between Julie and Solis. Because the Does failed to present this argument to the district court, they are barred from making this argument on appeal. *See Stokes v. Emerson Elec. Co.*, 217 F.3d 353, 358 n.19 (5th Cir. 2000) ("Arguments not raised in the district court cannot be asserted for the first time on appeal."); *Brown v. Ames*, 201 F.3d 654, 663 (5th Cir. 2000) ("To avoid being waived, an argument must be raised to such a degree that the trial court may rule on it." (internal quotations omitted)). We therefore hold,

without considering the Does' content-creation argument, that their negligence and gross negligence claims are barred by the CDA, which prohibits claims against Web-based interactive computer services based on their publication of third-party content. 47 U.S.C. § 230(c)(1), (e)(3). Because we affirm the district court based upon the application of § 230(c)(1), there is no need to apply § 230(c)(2), or to assess the viability of the Does' claims under Texas common law in the absence of the CDA.

IV. CONCLUSION

The judgment of the district court is AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

[Filed Feb. 13, 2007]

JANE DOE, Individually and as Next Friend of JULIE DOE, a minor,
Plaintiffs,

v.

MYSPACE, INC., and NEWS CORPORATION,
Defendants.

ORDER

BE IT REMEMBERED on the 1st day of February 2007, the Court held a hearing in the above-styled cause, to consider Defendants MySpace, Inc. and News Corporation's ("MySpace")[1] Motion to Dismiss [#6, 7, 15, 16, 36], Plaintiffs' responses thereto [#13, 14, 38], and Defendants' reply thereto [#20]. Having considered the motion, the responses, the replies, the arguments of counsel at the hearing, the relevant case law, and the case file as a whole, the Court now enters the following opinion and orders.

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[1] News Corporation, the parent company of MySpace, Inc., asserts the same motion to dismiss and adopts the arguments and reasoning presented by MySpace, Inc.; therefore, for purposes of this Order, a reference to MySpace and its arguments is actually a reference to both MySpace, Inc. and News Corporation.

Background

MySpace.com is the most visited web site in the United States, and it is owned by Defendant MySpace, Inc.[2] MySpace.com is a "social networking web site" that allows its members to create online "profiles," which are individual web pages on which members post photographs, videos, and information about their lives and interests. The idea of online social networking is that members will use their online profiles to become part of an online community of people with common interests. Once a member has created a profile, she can extend "friend invitations" to other members and communicate with her friends over the MySpace.com platform via e-mail, instant messaging, or blogs.

MySpace.com is free to users who agree to the MySpace Terms of Use Agreement. Every new member of MySpace.com, including Julie Doe, agrees to be bound by the MySpace.com Terms of Service, by clicking a check box on the website. MySpace's Terms of Service provide that MySpace cannot verify the age or identity of MySpace.com members and cautions members not to provide "telephone numbers, street addresses, last names, URLs or email addresses" to other members.

According to Plaintiffs' Verified Complaint, Julie Doe created a MySpace profile when she was 13 years old. At the hearing, Plaintiffs' counsel admitted that Julie Doe lied about her age and represented that she was 18 years old when she joined MySpace.com.[3]

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[2] Defendant MySpace, Inc. is wholly owned by Fox Interactive Media, Inc., a subsidiary of Defendant News Corporation.

[3] MySpace.com requires that a user be at least fourteen years old to use their services.

Plaintiffs allege Pete Solis, a nineteen-year-old, initiated contact with Julie Doe, then fourteen years old, through MySpace.com on April 6, 2006. Subsequently, Julie Doe provided Pete Solis with her telephone number and the two communicated over the phone for several weeks. At some point, Julie Doe and Pete Solis arranged to meet for a date on May 12, 2006. Plaintiffs allege that during that meeting Pete Solis sexually assaulted Julie Doe. On May 13, 2006, Jane Doe, Julie's mother, called the Austin Police Department to report the sexual assault of her daughter. Pete Solis was subsequently arrested and indicted by the Travis County District Attorney's Office for Sexual Assault, a second degree felony.

This case was filed in Bronx County, New York, on September 26, 2006, and subsequently removed to the United States District Court for the Southern District of New York on September 29, 2006. The Honorable Miriam Goldman Cedarbaum of the United States District Court for the Southern District of New York transferred the case to this Court, pursuant to 28 U.S.C. § 1404(a), on December 1, 2006. Plaintiffs' Verified Complaint, the live pleading in this case filed in Bronx County, New York, asserts the following causes of action against Defendants: negligence, gross negligence, fraud, and negligent misrepresentation.

I. Defendants' Motion to Dismiss

MySpace moves to dismiss this case with prejudice pursuant to Federal Rule of Civil Procedure 12(b)(6) and 9(b). Defendants assert they are immune from this suit under the Communications Decency Act of 1996. Defendants also assert Plaintiffs' negligence claims fail under the common law and Plaintiffs' fraud and negligent misrepresentation claims do not

satisfy the heightened pleading standard of Federal Rule of Civil Procedure 9(b).

A. Communications Decency Act of 1996

The Communications Decency Act of 1996, 47 U.S.C. § 230 (the "CDA" or the "Act"), states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). Neither party contests that MySpace is an "interactive computer service" as defined by the CDA, and it is clear that MySpace meets the statutory definition of such a service. *See* 47 U.S.C. § 230(f)(2). The term "information content provider" means "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." 47 U.S.C. § 230(f)(3). It is also clear that both Julie Doe and Pete Solis qualify as "information content providers" with respect to their communications through MySpace.

In crafting Section 230, Congress made the following findings:

> (1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.
>
> (2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.

> (3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.
>
> (4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.
>
> (5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

47 U.S.C. § 230(a).

The policy underlying the CDA is the promotion of "the continued development of the Internet and other interactive computer services . . . ." 47 U.S.C. § 230(b)(1). To ensure that web site operators and other interactive computer services would not be crippled by lawsuits arising out of third-party communications, the Act provides interactive computer services with immunity. *See Dimeo v. Max,* 433 F. Supp. 2d 523, 528 (E.D. Pa. 2006) ("The provision 'precludes courts from entertaining claims that would place a computer service provider in a publisher's role,' and therefore bars 'lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone, or alter content.") (quoting *Green v. America Online,* 318 F.3d 465, 471 (3d Cir. 2003); *Zeran v. America Online, Inc.,* 129 F.3d 327, 330 (4th Cir. 1997)). The CDA thus encourages web sites and other "interactive computer services" to create forums for

people to exchange their thoughts and ideas by protecting web sites and interactive computer services from potential liability for each message republished by their services. *See Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1122-24 (9th Cir. 2003); *Zeran*, 129 F.3d at 330-31.

Several courts have construed the CDA to date. In *Carafano*, a case involving false online personal ad listings, which led to Christine Carafano's receipt of sexually explicit phone calls, letters, and hand-delivered notes, the Ninth Circuit Court of Appeals held that the CDA granted the interactive service provider Matchmaker.com full immunity where a third party willingly provided the essential published content. 339 F.3d at 1124. The Ninth Circuit explained the policy underlying the CDA as follows:

> The specter of tort liability in an area of such prolific speech would have an obvious chilling effect. It would be impossible for service providers to screen each of their millions of postings for possible problems. Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted. Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect.

Id. at 1124 (quoting *Zeran*, 129 F.3d at 330-31).

One of the most important and oft-cited cases to date is *Zeran v. America Online, Inc.* In *Zeran*, the victim of a vicious prank sued America Online, Inc. ("AOL") for failing to remove a false advertisement

offering t-shirts featuring tasteless slogans related to the 1995 Oklahoma City bombing and instructing interested buyers to call the plaintiff to place an order. 129 F.3d at 329. After receiving death threats from people who were outraged by the ad, Zeran learned of the prank and demanded that AOL remove the ad from its bulletin board and post a retraction. *Id.* AOL failed to remove the original ad, and the unidentified poster also posted several more ads listing the plaintiff's phone number. *Id.* A local radio station learned of the ads and encouraged its listeners to harass Zeran. *Id.* The volume and intensity of the threats became so severe that local police guarded Zeran's home to protect his safety. *Id*

Zeran sued AOL for negligence because it failed to remove the ad after specific notice of its falsity and allowed the third party to post additional ads after Zeran had put AOL on notice of his harassment and bodily danger. The Fourth Circuit affirmed the dismissal of the claims on the pleadings, explaining that the CDA necessarily protects interactive computer services from liability even after they are notified of an allegedly defamatory or threatening post because the insupportable legal burden imposed by potential tort liability would undermine the CDA's goal of promoting speech on the Internet. *Id* at 330. The Court explained that [b]y its plain language, § 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service." *Id.* In enacting the CDA, "Congress made a policy choice . . . not to deter harmful online speech through the separate route of imposing tort liability on companies that serve as intermediaries for other parties' potentially injurious messages." *Id.* at 330-31.

Despite Plaintiffs' arguments to the contrary, the Court finds *Zeran* and its rationale to be applicable to the case at hand. Here, Plaintiffs seek to impose tort liability on MySpace, a company that functions as an intermediary by providing a forum for the exchange of information between third party users. Plaintiffs' allegations that MySpace knew sexual predators were using the service to communicate with minors and failed to react appropriately can be analogized to Zeran's claims that AOL failed to act quickly enough to remove the ads and to prevent the posting of additional ads after AOL was on notice that the content was false.

Plaintiffs contend the CDA is inapplicable to their claims, so Defendants should not be granted immunity under the CDA. Plaintiffs assert Section 230(c)(1) is inapplicable here because Plaintiffs have not sued MySpace for the publication of third-party content but rather for failing to implement basic safety measures to prevent sexual predators from communicating with minors on MySpace. Plaintiffs attempt to distinguish *Carafano, Zeran,* and *Prickett v. Info USA, Inc.,* No. 4:05-CV-10, 2006 WL 887431 (E.D. Tex. Mar. 30, 2006), from the case at hand, by pointing out that each of these cases was based on the listing of third-party content without taking into account its defamatory or inaccurate nature. Plaintiffs assert their case is not based on MySpace's posting of third-party content, but rather on MySpace's failure to institute safety measures to protect minors.

Plaintiffs seek to limit CDA immunity to cases involving defamation or related actions and assert that their claims against MySpace have nothing to do with the content of the information provided.

Plaintiffs contend that neither the plain language of the CDA nor the cases interpreting it contemplate the extension of the CDA's immunity provision to MySpace in this case.

Nothing on the face of the statute supports Plaintiffs' narrow interpretation that the CDA's immunity applies only to cases involving defamation and defamation-related claims. 47 U.S.C. § 230. The Eastern District of Texas recently addressed the application of CDA immunity in a case involving claims of negligence, negligence per se, intentional infliction of emotional distress, invasion of privacy, civil conspiracy, and distribution of child pornography. *Doe v. Bates,* No. 5:05-CV-91-DF-CMC, 2006 WL 3813758 (E.D. Tex. Dec. 27, 2006). This case dealt with a lawsuit against Yahoo! Inc., which arose from an e-group hosted by Yahoo! on which illegal child pornography pictures were posted by a third party. Among the photos were sexually explicit photos of Johnny Doe, a minor. The district court determined that Section 230(c)(1) applied to immunize Yahoo! because Plaintiffs' claims sought to treat Defendant as the "publisher or speaker" of the third-party content (the photos). *Id* at * 2-4. It is important to note that in *Bates,* as here, the Plaintiffs did not allege that there was anything defamatory or inaccurate about the posted content,[4] but the court still applied the CDA to immunize Yahoo! from suit.

Defendants have presented numerous cases in which the CDA has been applied to bar non-

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[4] Rather, the Plaintiffs in *Bates* alleged Yahoo! knowingly hosted illegal child pornography on its e-group and that Yahoo! should have prevented, removed, and/or blocked the illegal child pornography from its website. *Id.* at *20.

defamation claims. *See, e.g., Ben Ezra, Weinstein & Co. v. America Online, Inc.*, 206 F.3d 980, 986 (10th Cir. 2000) (negligence claim); *Zeran*, 129 F.3d at 330 (negligence claims); *Bates*, 2006 WL 3813758 at *5 (negligence, negligence per se, intentional infliction of emotional distress, invasion of privacy, civil conspiracy and distribution of child pornography); *Beyond Sys., Inc. v. Keynetics, Inc.*, 422 F. Supp. 2d 523, 536 (D. Md. 2006) (claim under Maryland Commercial Electronic Mail Act); *Barnes v. Yahoo!, Inc.*, No. Civ. 05-926-AA, 2005 WL 3005602, at *4 (D. Or. Nov. 8, 2005) (negligence claim resulting in personal injury). All of these cases involved attempts to hold an interactive computer service liable for its publication of third-party content or harms flowing from the dissemination of that content.

Plaintiffs argue the CDA does not bar their claims against MySpace because their claims are not directed toward MySpace in its capacity as a publisher. Plaintiffs argue this suit is based on MySpace' s negligent failure to take reasonable safety measures to keep young children off of its site and not based on MySpace' s editorial acts. The Court, however, finds this artful pleading to be disingenuous. It is quite obvious the underlying basis of Plaintiffs' claims is that, through postings on MySpace, Pete Solis and Julie Doe met and exchanged personal information which eventually led to an in-person meeting and the sexual assault of Julie Doe. If MySpace had not published communications between Julie Doe and Solis, including personal contact information, Plaintiffs assert they never would have met and the sexual assault never would have occurred. No matter how artfully Plaintiffs seek to plead their claims, the Court views Plaintiffs' claims as directed toward

MySpace in its publishing, editorial, and/or screening capacities. Therefore, in accordance with the cases cited above, Defendants are entitled to immunity under the CDA, and the Court dismisses Plaintiffs' negligence and gross negligence claims with prejudice under rule 12(c) of the Federal Rules of Civil Procedure.[5]

i. Self-Regulation

In addition to the protection afforded to interactive computer services in their publishing capacity, the CDA also immunizes such services from liability based on efforts to self-regulate material. Specifically, "[n]o provider or user of an interactive computer service shall be held liable on account of—(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable . . . ." 47 U.S.C. § 230(c)(2)(A). This section reflects Congress's recognition that the potential for liability attendant to implementing safety features and policies created a disincentive for interactive computer services to implement any safety features or policies at all. To the extent Plaintiffs seek to hold MySpace liable for ineffective security measures and/or policies relating to age verification,[6] the Court alternately finds such claims are barred under § 230(c)(2)(A).

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[5] Although Defendants moved to dismiss Plaintiffs' claims based on Federal Rule of Civil Procedure 12(b)(6), the Court may construe such a motion to a motion for judgment on the pleadings under Rule 12(c). *Jones v. Greninger*, 188 F.3d 322, 324 (5th Cir. 1999).

[6] The Court finds Plaintiffs' claims particularly unwarranted

B. Duty to Protect under Texas Law

Under Texas Law, to state a claim for negligence or gross negligence, Plaintiffs must allege the existence of a duty, a breach of that duty, and damages proximately caused by the breach. *Western Invs., Inc. v. Urena,* 162 S.W.3d 547, 550 (Tex. 2005). Defendants assert Plaintiffs have failed to state a claim for negligence or gross negligence because MySpace had no legal duty "to institute and enforce" security measures that would substantially decrease the likelihood that Julie Doe would be sexually assaulted. "The existence of a duty is a question of law for the court to decide from the facts surrounding the occurrence in question. As a general rule, a person has no legal duty to protect another from the criminal acts of a third person or control the conduct of another." *Walker v. Harris,* 924 S.W.2d 375, 377 (Tex. 1996) (internal citations omitted); *accord Greater Houston Transp. Co. v. Phillips,* 801 S.W.2d 523, 525 (Tex. 1990) ("Generally, there is no duty to control the conduct of third persons.").

The general rule of course has exceptions, such as when a special relationship exists between the actor and the third person, which special relationship imposes a duty upon the actor to control the third person's conduct. *Phillips,* 801 S.W.2d at 525. These special relationships include the relationship between: (1) employer and employee; (2) parent and child; and (3) independent contractor and contractee under special circumstances. *Id.* Plaintiffs have alleged no such special relationship between

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here given that Julie Doe lied about her actual age to bypass the age requirement and then violated MySpace's express rules by giving out her personal information.

MySpace and either Pete Solis or Julie Doe. Here the alleged sexual assault happened offline, after telephone conversations offline, and there is no allegation MySpace was in control of the premises where the crime occurred.[7] Defendants assert Plaintiffs have failed to state a claim for negligence or gross negligence because MySpace had no legal duty to prevent the alleged sexual assault.

Plaintiffs respond that MySpace had a duty to institute reasonable safety measures to protect minors from sexual predators because it was foreseeable that minors such as Julie Doe could be injured by the criminal acts of adult MySpace users. *Walker,* 924 S.W.2d at 377 (stating that premises owners have a duty to protect persons injured by the criminal acts of third parties on their premises if the criminal acts were foreseeable). "Foreseeability requires only that the general danger, not the exact sequence of events that produced the harm, be foreseeable." *Id.* (citing *Lofton v. Texas Brine Corp.,* 777 S.W.2d 384, 387 (Tex. 1989)). Plaintiffs also cite *Rodriquez v. Moerbe,* 963 S.W.2d 808, 817 (Tex. App.—San Antonio 1998, no pet.), as recognizing the exception to the no duty rule for a third party's criminal conduct that is the foreseeable result of the defendant's negligence. Plaintiffs allege MySpace was on notice of several previous sexual assaults perpetrated by MySpace users against minor members; therefore, Julie Doe's sexual assault was the foreseeable result of MySpace's negligent failure to take appropriate safety measures. Plaintiffs assert MySpace had a duty to institute reasonable safety

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[7] At the hearing counsel stated that the alleged sexual assault occurred in a parking lot in Travis County, Texas.

measures to prevent contact between sexual predators and minors on its website.

However, the Court is unconvinced that any exception to the general no duty rule applies to MySpace here. Plaintiffs allege MySpace can be liable under a negligence standard when a minor is harmed after wrongfully stating her age, communicating with an adult, and publishing her personal information. To impose a duty under these circumstances for MySpace to confirm or determine the age of each applicant, with liability resulting from negligence in performing or not performing that duty, would of course stop MySpace' s business in its tracks and close this avenue of communication, which Congress in its wisdom has decided to protect.[8] The Court declines to extend premises liability cases to the internet context particularly where, as here, the Defendant provides its service to users for free. Plaintiff has cited no case law indicating that the duty of a premises owner should extend to a website as a "virtual premises." Although it is not controlling here, the Court finds the Seventh Circuit's analysis of a similar case instructive.

> Plaintiffs do not cite any case in any jurisdiction holding that a service provider must take reasonable care to prevent injury to third parties. Consider the Postal Service or Federal Express, which sell transportation services that could be used to carry harmful articles. As far as we can discover, no court has held such a carrier liable for failure to detect and remove harmful

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[8] To date, MySpace has more than 100 million registered users worldwide, and it is the most visited website in the United States, as previously noted.

> items from shipments. . . . Similarly, telephone companies are free to sell phone lines to entities . . . , without endeavoring to find out what use the customers make of the service. . . .
>
> Yet an ISP, like a phone company, sells a communications service; it enabled [the user] to post a web site and conduct whatever business [the user] chose. . . . Landlord, phone company, delivery service, and web host all could learn, at some cost, what [the user] was doing with the services and who was potentially injured as a result; but state law does not require these providers to learn, or to act as Good Samaritans if they do. The common law rarely requires people to protect strangers, or for that matter acquaintances or employees. States have enacted statutes to change that norm in some respects; Dram Shop laws are good examples. Plaintiffs do not identify anything along those lines concerning web hosts. . . .

Doe v. GTE Corp., 347 F.3d 655, 661 (7th Cir. 2003) (affirming district court's dismissal of claims against internet services and web hosting services for hosting images of athletes who were unknowingly recorded unclothed in a locker room because web hosting services have no duty to investigate their clients' activities or to prevent potential injury that results therefrom).

Accordingly, the Court finds Plaintiffs have failed to state a claim for negligence or gross negligence because MySpace had no duty to protect Julie Doe from Pete Solis's criminal acts nor to institute reasonable safety measures on its website. If anyone

had a duty to protect Julie Doe, it was her parents, not MySpace.[9]

C. Fraud and Misrepresentation

Defendants move to dismiss Plaintiffs' fraud and negligent misrepresentation claims for failure to state a claim on which relief may be granted because they do not meet the heightened pleading standard of Federal Rule of Civil Procedure 9(b). Rule 9(b) provides that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." FED. R. CIV. P. 9(b). "At a minimum, Rule 9(b) requires allegations of the particulars of 'time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby.'" *Tel-Phonic Servs., Inc. v. TBS Intl, Inc.*, 975 F.2d 1134, 1139 (5th Cir. 1992).

The Court agrees with Defendants that Plaintiffs have not plead their fraud and misrepresentation claims with sufficient particularity. Plaintiffs counsel also admitted in open court that Plaintiffs no longer wish to pursue their claims of fraud and misrepresentation because the real basis of their case is negligence. Accordingly, the Court dismisses Plaintiffs claims of fraud and negligent misrepresentation without prejudice pursuant to Federal Rule of Civil Procedure 9(b).

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[9] Having already determined that dismissal is proper on the foregoing bases, the Court need not reach the question of whether or not Plaintiffs' negligence and gross negligence claims should be dismissed based on a lack of proximate causation under the doctrine of "new and independent cause."

Conclusion

In accordance with the foregoing:

IT IS ORDERED that Defendants MySpace, Inc. and News Corporation's Motion to Dismiss [#6, 7, 16, 36] is GRANTED; and

IT IS FURTHER ORDERED that Plaintiffs' claims of negligence and gross negligence are DISMISSED WITH PREJUDICE and Plaintiffs' claims of fraud and negligent misrepresentation are DISMISSED WITHOUT PREJUDICE.

SIGNED this the 13th day of February 2007.

/s/ Sam Sparks
SAM SPARKS
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

[Filed Feb. 13, 2007]

JANE DOE, Individually and as Next Friend of JULIE DOE, a minor,
Plaintiffs,

v.

MYSPACE, INC., and NEWS CORPORATION,
Defendants.

ORDER OF DISMISSAL

BE IT REMEMBERED on the 13th day of February 2007; the Court entered its order granting Defendants' Motion to Dismiss, and thereafter enters the following final order of dismissal:

IT IS ORDERED, ADJUDGED, and DECREED that Plaintiffs' claims of negligence and gross negligence are DISMISSED WITH PREJUDICE and Plaintiffs' claims of fraud and negligent misrepresentation are DISMISSED WITHOUT PREJUDICE. Defendants MySpace, Inc. and News Corporation shall go hence without delay and with their costs, for which let execution issue against Plaintiffs.

SIGNED this the 13th day of February 2007.

/s/ SAM SPARKS
SAM SPARKS
UNITED STATES DISTRICT JUDGE

APPENDIX D

§ 230. Protection for private blocking and screening of offensive material

(a) Findings

The Congress finds the following:

(1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.

(2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.

(3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.

(4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.

(5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

(b) Policy

It is the policy of the United States—

(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and

(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

(c) Protection for "good samaritan" blocking and screening of offensive material

(1) Treatment of publisher or speaker

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) Civil liability

No provider or user of an interactive computer service shall be held liable on account of—

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

(d) Obligations of interactive computer service

A provider of interactive computer service shall, at the time of entering an agreement with a customer for the provision of interactive computer service and in a manner deemed appropriate by the provider, notify such customer that parental control protections (such as computer hardware, software, or filtering services) are commercially available that may assist the customer in limiting access to material that is harmful to minors. Such notice shall identify, or provide the customer with access to information identifying, current providers of such protections.

(e) Effect on other laws

(1) No effect on criminal law

Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of Title 18, or any other Federal criminal statute.

(2) No effect on intellectual property law

Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

(3) State law

Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

(4) No effect on Communications Privacy law

Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.

(f) Definitions

As used in this section:

(1) Internet

The term "Internet" means the international computer network of both Federal and non-

Federal interoperable packet switched data networks.

(2) Interactive computer service

The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

(3) Information content provider

The term "information content provider" means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.

(4) Access software provider

The term "access software provider" means a provider of software (including client or server software), or enabling tools that do any one or more of the following:

(A) filter, screen, allow, or disallow content;

(B) pick, choose, analyze, or digest content; or

(C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.

APPENDIX E

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

[Filed Sept. 26, 2006]

JANE DOE, Individually, and, As Next of Friend of JULIE DOE, a minor,
Plaintiffs,

v.

MYSPACE, INCORPORATED and NEWS CORPORATION,
Defendants.

Verified Complaint

Plaintiffs, Jane Doe, individually, and as next of friend of Julie Doe, a minor ("Plaintiffs"), seek damages against Defendants MySpace Incorporated ("MySpace") and News Corporation ("News Corp.") for negligence, gross negligence, fraud and negligent misrepresentation—Defendants MySpace and News Corp. are jointly and severely liable for all of Plaintiffs' causes of action. Plaintiffs would respectfully show the Court as follows:

The Parties

1. Plaintiff, Julie Doe, is a 14-year-old minor who resides in Texas.

2. Plaintiff, Jane Doe, is the parent and legal guardian of Julie Doe and resides Texas.

3. Defendant, MySpace Incorporated, is a Delaware Corporation and a wholly-owned subsidiary of Defendant News Corp. MySpace is authorized to

conduct and transact business in the State of New York, and does in fact regularly conduct and transact business in the State of New York. MySpace's decisions and/or lack of decisions in New York have caused the underlying events in this lawsuit.

4. Defendant, News Corporation, is a Delaware Corporation with its headquarters and principal place of business in New York, New York. News Corp. is authorized to conduct and transact business in the State of New York, and does in fact conduct and transact business in the State of New York. News Corp.'s decisions and/or lack of decisions in New York have caused the underlying events in this lawsuit.

5. Venue in this Court is proper as News Corp. is headquartered and its principal place of business is in New York, New York.

Facts

An Overview of MySpace

6. MySpace.com ("MySpace") is a social networking internet website where children and adults of all ages are encouraged to sign up and socialize in cyberspace. Founded in. July 2003 by Tom Anderson and Chris DeWolfe, MySpace quickly exploded in popularity and became an online force to be reckoned with. In less than two years, MySpace has amassed more than 100 million registered users worldwide. As of July 11, 2006, MySpace is the world's most visited domain on the internet for internet users located in the United States.[1]

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[1] Bill Tancer, *Myspace Moves to #1 Position for all Internet Sites*, Hitwise Intelligence Analyst Slogs, July 11, 2006 at

7. In an attempt to capitalize on this success, Tom Anderson and Chris DeWolfe sold MySpace and its parent company, Intermix Media, Inc., to News Corp. for an estimated $649 million. News Corp. is a worldwide media conglomerate with approximately $55 billion in total assets and approximately $24 billion per year in annual revenues.

8. To access the social network, one must create a MySpace account. In order to create a MySpace account, all one has to do is enter a name, email address, gender, country, and date of birth. None of this information has to be true. MySpace does not have any verification mechanism in place to authenticate a new user's age or identification information. MySpace represents that a user must be at least 14 years of age to join of course, this is not subject to any form of authentication. Thus, MySpace does not have any verification mechanism to ensure its users are of the age they claim to be, effectively providing a complete blanket of anonymity.

9. Once signed up, each MySpace user is given his or her own personal webpage to create. MySpace users are then prompted to post photographs and personal information on their webpage. Typically, a MySpace user's webpage is viewable by any other MySpace user. Further, any MySpace user can contact any other MySpace user through internal email and/or instant messaging on MySpace. MySpace users of all ages are then encouraged to begin socializing with other MySpace users.

10. MySpace currently has more than 100 million registered users online. It is also estimated that

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http://weblogs.hitwise.com/billtancer/2006/07/myspace_moves_into_1_position.html

MySpace has over thirty (30) billion page views per month.[2] Ross Levinsohn, Senior Vice President and General Manager of Fox Interactive Media (a wholly-owned subsidiary of News Corp.), says that not even the internet giant Google.com believes it can provide enough advertisements to fill all the pages that MySpace displays each day.[33]

11. The catalyst behind MySpace's amazing surge in popularity is their underage users demographic. According to MySpace, approximately 22 percent of MySpace visitors are minors, under the age of 18.[4] MySpace actively and passively markets itself to minors.

12. Rupert Murdoch, News Corp. Chairman and Chief Executive Officer, is well aware that MySpace's continued success is directly tied into the website's appeal among young people, and the advertising revenue MySpace can generate.[55] News Corp., the parent company that wholly-owns MySpace, is adamant that MySpace CEO Chris DeWolfe find a way to make much more money from MySpace.[6] MySpace is projected to generate around $200 million dollars in revenue this year, and has the potential to

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[2] Michael Arrington, *The 27,4 Billion Pound Gorilla,* TechCrunch, June 13, 2006, at http://www.techcrunch.com/2006/06/13/MySpace-the-27-billion-pound-gorilla

[3] Saul Hansell, *For MySpace, Making Friends Was Easy. Big Profit is Tougher.,* The New York Times, April 23, 2006

[4] Julia Angwin and Brian Steinberg, *News Corp. Goal: Make MySpace Safer For Teens,* The Wall Street Journal, February 17, 2006.

[5] Saul Hansell, *For MySpace, Making Friends Was Easy. Big Profit is Tougher.,* The New York Times, April 23, 2006

[6] *Id.*

generate much more revenue as MySpace's popularity with the young teenagers continues to grow[7] News Corp. ultimately controls the short and long term business decisions associated with MySpace.

13. The News Corp. CEO is equally aware of the dangers MySpace poses to underage minors using MySpace. In his February 13, 2006 interview with Newsweek Magazine, when asked about claims by law enforcement that sexual predators are trolling MySpace in search of young victims, Mr. Murdoch stated,

> ***"We're being very proactive.*** We plan to reach out further to schools, principals, church, groups and community organizations to educate them on the safety measures we've developed. ***For example, no one under 14 is allowed on the site, and there are strict limits on who can access profiles of users under 16..."***[8]

While attempting to expand MySpace's success and popularity with underage minors, he has been increasingly confronted by state Attorneys General across the United States and the public at large about the dangers MySpace poses to its underage users. Yet, MySpace has made no real effort to meaningfully increase the safety and security of their most important asset young underage MySpace users. Sadly, Mr. Murdoch's initial strategy "seems to be to do nothing to interfere with whatever alchemy

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[7] *Id.*

[8] Len Irish, *Murdoch's New Groove,* Newsweek, February 13, 2006

has attracted so many young people to MySpace in the first place."[9]

14. MySpace proudly represents to parents and the public at large that teenagers under the age of 14 are not allowed to join MySpace. MySpace represents that the website has protections in place so that MySpace users ages 14 and 15 cannot be contacted by adult MySpace users. MySpace has publicly represented that the website is safe for its young underage users and that MySpace is doing everything to ensure it has adequate security measures in place to protect its young underage users.[10]

15. Despite MySpace's claims that MySpace is safe for young underage users, the facts suggest otherwise.

Adult Sexual Predators on MySpace

16. In the past year, a disturbing number of incidents have occurred nationwide in which adult MySpace users contacted young underage MySpace users on MySpace. The adult MySpace users then arranged to meet the minors and, often, sexually assaulted them. The following is a brief, non-exhaustive list, of a few of the criminal incidents that have resulted from adult MySpace users contacting young underage MySpace users on MySpace:

a. On December 29, 2005, John David Payne of Brenham, Texas, was arrested for soliciting

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[9] Saul Harwell, *For MySpace, Making Friends Was Easy. Big Profit is Tougher.*, The New York Times, April 23, 2006.

[10] Julia Angwin and Brian Steinberg, *News Corp. Goal: Make MySpace Safer For Teens,* The Wall Street Journal, February 17, 2006

sex from young underage MySpace users. Mr. Payne thought he was chatting with young underage MySpace users on MySpace but, in reality, they were actually undercover investigators. On or about May 10, 2006, Mr. Payne was again arrested for soliciting sex on MySpace from young underage MySpace users.[11]

b. On March 2, 2006, Federal prosecutors charged Sonny Szeto, 22, of New York, for using MySpace to meet an 11-year-old girl.[12]

c. On March 2, 2006, Federal prosecutors charged Stephen Letavec, 39, of Pennsylvania, for using MySpace to meet a 14-year-old girl.[13]

d. On May 1, 2006, Aaron Whitney, 27, of Chaplin, Connecticut, was charged with sexually assaulting a 13-year-old girl he met on MySpace.[14]

e. On May 6, 2006, Jesse Cahn, 22, of Stevens Point, Wisconsin, was charged with six counts of sexually assaulting a 14-year-old girl he met on MySpace.[15]

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[11] John Mortiz, *Attorney General Wants Web MySpace to Protect Young Users*, Fort Worth Star-Telegram, May 23, 2006.

[12] *MySpace.com to Bolster Security Measures*, Reuters Limited, March 3, 2006.

[13] *Id.*

[14] *Chaplin Man Arrested; Allegedly Met Girl, 13, on MySpace.com*, Norwich Bulletin, May 2, 2006.

[15] News Channel 7, Wausau, Wisconsin, at http://www.wsaw.com/home/headlines/2815471.html.

f. On May 12, 2006, Juan Gomez, 34, of Mount Vernon, New York, was charged with the felony of attempted dissemination of indecent material to a minor. Mr. Gomez contacted a 14-year-old girl on MySpace and engaged her in sexually explicit conversations. He was arrested when he attempted to meet the 14-year-old girl.[16]

g. On May 15, 2006, Matthew R. Gale, 26, of Macomb, Illinois, was charged with six counts of aggravated sexual abuse and four counts of criminal sexual assault of a 16-year-old girl he contacted on MySpace.[17]

h. On May 22, 2006, a cyber crimes sting set up by the Texas Attorney General's Office netted the arrests of three adult men attempting to solicit sex from young underage MySpace users on MySpace.[18]

i. On May 29, 2006, prosecutors in Cleveland, Ohio, charged two adult men, Albert Azolino, 21, and Timothy Norman, 33, with sexually assaulting a 14-year-old girl they contacted on MySpace.[19]

j. On or about June 6, 2006, John Wentworth, 27, of Morris, Illinois, was charged with

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[16] *Ex-Teacher's Aide Caught in Pedophile Sting Operation*, North Country Gazette, May 12, 2006.

[17] Stacey Creasy, *Police Dig into Suspect's Past*, Daily Review Atlas, May 15, 2006.

[18] News Channel 11, Houston, Texas at http://www.khou.com/news/local/stories/khou060522_ac_cybercrimessting.19ele54.html.

[19] News Channel 3, Cleveland, Ohio at http://www.wkyc.com/news/watercooler_article.asp?storyid=53044.

indecent solicitation of a child, attempted criminal sexual assault and aggravated criminal sexual abuse whe . he attempted to meet and sexually assault a 14-year-old girl he contacted on MySpace.[20]

k. On or about June 7, 2006, three Connecticut adult men were charged with numerous counts of sexual assault and risk of injury to a child for incidents involving two underage MySpace users they met on MySpace. Both girls were under the age of 16.[21]

l. On or about June 10, 2006, Shaun Roethlisberger, 21, of Duluth, Minnesota, was charged with two counts of third-degree criminal sexual conduct for having sexual intercourse with a 14-year-old girl he met on MySpace.[22]

m. On or about June 12, 2006, Jay Coffield, 44, of Naperville, Illinois, was arrested for soliciting sex from a 14-year-old girl he met on MySpace.[23]

Attorney Generals' Responses

17. The above-listed incidents have sparked considerable media attention and concern from the

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[20] Jo Ann Hustis, *Man Charged with Solicitation,* Morris Daily Herald, June 12, 2006.

[21] Tom Kasprzak, *5 Connecticut Males Charged in Net Sex Case Connected to Stonington Girls,* The Westerly Sun, June 7, 2006.

[22] Mark Stodghill, *Sex Offender Arrested,* Duluth News Tribune, June 10, 2006.

[23] *Police Say Man Arranged Sex with Girl, 14, on MySpace.com,* Chicago Tribune, June 11, 2006.

public. As a result of these incidents, several state Attorneys General opened investigations into MySpace's lax security policies. They all concluded that despite MySpace's express representations to the public, MySpace has no meaningful security measures or policies in place to protect young underage MySpace users.

18. On February 2, 2006, Connecticut Attorney Richard Blumenthal opened a formal investigation into MySpace. On March 20, 2006, Attorney General Blumenthal sent MySpace, through their attorneys, a formal letter requesting, among other things, that MySpace: (l) raise the minimum age for a MySpace user from 14 to 16; and (2) require MySpace users to log in and verify their age before viewing profiles. *See attached,* Exhibit A, fully incorporated herein by reference.

19. On March 24, 2006, Ohio Attorney General Jim Petro sent MySpace Chief Executive Officer Chris DeWolfe a formal letter detailing that Ohio children were in danger due to the lax operating policies of MySpace and, among other things, urged MySpace to: (1) increase the minimum user age from 14 to 16; (2) prohibit adult users from accessing the profiles of young underage MySpace users; and (3) require that all new users enter a verifiable credit card number during the registration, process. *See attached,* Exhibit B, fully incorporated herein by reference.

20. Additionally, in March 2006, representatives for Massachusetts Attorney General Tom Reilly met with MySpace representatives to discuss their concerns about MySpace. Attorney General Reilly's office concluded that although MySpace maintains that only members under the age of 18 can view the

profiles of members aged 14 to 15 years-old, their investigation revealed that MySpace does not have any system in place to verify its members' ages. Thus, nothing is preventing adult MySpace users from contacting young underage MySpace users.

21. On or about May 2, 2006, Attorney General Reilly sent a formal letter to MySpace company officials demanding that MySpace increase its minimum user age from 14 to 18 and institute an age and identify verification system. *See attached,* Exhibit C, fully incorporated herein by reference.

22. On May 22, 2006, Texas Attorney General Greg Abbott sent MySpace CEO Chris DeWolfe a notice letter expressing similar concerns. In it, Attorney General Abbott informed MySpace that:

> "By not requiring bank account information or a credit card in order to access your services, ***you have no way of authenticating the identify or age of your users, thereby providing a blanket of anonymity to those who wish to engage in criminal activity on your website.*** Although I understand you currently use an age verification system, ***our investigators have found it uncomfortably easy*** in ***a relatively short period of time to locate many underage profiles on your MySpace.*** A system of identity/age verification via credit card or a verified email account would be a better system than the current methods used by your web MySpace." (emphasis added)

See attached, Exhibit D, fully incorporated herein by reference.

MySpace's Response

23. In light of these numerous incidents, pressure from Attorneys General around the United States, and a growing media interest, MySpace representatives went on the defensive and issued numerous public statements emphasizing the safety of MySpace for young underage MySpace users. In February 2006, MySpace representatives told CBS News that:

> "There are a number of specific procedures and policies in place to ensure users of all ages have a safe and meaningful experience. These include limiting use of the website to users who are at least 14 years of age and ***providing special protections to users who are under 16 so that their personal information cannot be accessed by persons they do not know.***"[24]

Even MySpace's parent company, News Corp., came out publicly with a statement from its CEO, Rupert Murdoch, stating:

> ***"We're being very proactive.*** We plan to reach out further to schools, principals, church groups and community organizations to educate them on the safety measures we've developed. ***For example, no one under 14 is allowed on the site, and there are strict limits on who can access profiles of users under 16...***"[25]

24. As of June 19, 2006, MySpace also expressly represents these policies in the "Terms and

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[24] *MySpace.com Responds to Web Risks*, CBS News, February 6, 2006 (emphasis added).

[25] Len Irish, *Murdoch's New Groove*, Newsweek, February 13, 2006.

Conditions" section on MySpace. MySpace claims that it is "illegal" or "prohibited" to "solicit personal information from anyone under 18." MySpace also has a section entitled "Tips for Parents" where they state "MySpace members must be 14 years of age or older."

25. Notwithstanding MySpace's express representations to the contrary, problems of young underage MySpace users being contacted and sexually assaulted by adult MySpace users continue to plague MySpace. In further attempts to appease the public, in late April 2006, MySpace CEO Chris DeWolfe unveiled and widely-publicized a three-prong strategy to address growing safety concerns. The strategy included:

(1) Putting in security technology, such as tools that allow children aged 14-16 years old to shield their personal information from strangers;

(2) Increasing manpower to review photos and images uploaded by MySpace users; and

(3) Hiring Hemanshu Nigam (a former Federal Prosecutor, and so-called "Safety Czar") to head-up MySpace security.[26]

26. Unfortunately, MySpace's widely-publicized security strategy was simply public showmanship and a veiled attempt to appease the growing public outcry over their security concerns. MySpace knew that these measures did nothing to meaningfully increase the safety of young underage MySpace users. Yet, MySpace advertised it to the public as a

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[26] Jesse Hempel, *From MySpace to Safer Place?*, Business Week, April 11, 2006.

substantial increase in the security of MySpace for young underage MySpace users. Tragically, by failing' to properly address these concerns and institute meaningful security measures for young underage MySpace users, 14-year-old Julie was sexually assaulted by an adult MySpace user who found her on MySpace.

The Sexual Assault of 14-Year-Old Julie Doe

27. In the summer of 2005, 14-year-old Julie created a profile on MySpace. At the time, Julie was only 13-years-old. Despite MySpace's supposed safety precautions and protections prohibiting anyone under 14-years-old from using MySpace, Julie was easily able to create a profile. Julie did not regularly begin using MySpace until approximately February 2006.

28. On April 6, 2006, in complete contradiction to MySpace's and News Corp.'s direct and indirect representations to the contrary, a 19-year-old adult MySpace user (and a complete stranger) initiated contact with 14-year-old Julie via MySpace and began his attempts to befriend her. Thus began a series of communications initiated by the 19-year-old adult MySpace user via MySpace.

29. On May 12, 2006, the 19-year-old adult MySpace user lured 14-year Julie out and sexually assaulted her.

30. On May 13, 2006, Jane Doe called the Austin Police Department to report the sexual assault of her minor daughter, 14-year-old Julie.

31. A detective from the Child Abuse Investigations Unit of the Austin Police Department conducted an investigation. In a videotaped confession, the 19-yearold adult MySpace user

admitted to initiating contact with 14-year-old Julie on MySpace, soliciting her personal information, gaining her trust, and then sexually assaulting her. The 19-year-old adult MySpace user was then arrested by the Austin Police Department and indicted by the Travis County District Attorney's Office for Sexual Assault, a 2nd Degree Felony.

CAUSES OF ACTION

32. MySpace actively and passively encourages young underage age children to join MySpace, and then directs them to communicate and socialize with complete strangers.

33. It is undisputed that MySpace's recent surge in popularity is driven by the onslaught of young underage users joining and using MySpace. To that end, MySpace has a very strong financial incentive to ensure that MySpace's popularity with young underage children remains intact, and continues to increase. MySpace has no financial incentive to institute any meaningful security measures to increase the safety of young underage MySpace users. In fact, MySpace's interest is to ensure that access to MySpace by young underage children remains effortless and unfettered.

34. Despite MySpace's knowledge of the increasing occurrences of sexual assaults on young underage MySpace users by adult MySpace users, and despite MySpace's express representations to the contrary, there are absolutely no meaningful protections or security measures to protect young underage users from being contacted by adult sexual predators on MySpace.

35. MySpace's numerous representations to the public of "extra precautions" and "special protections"

in place that "ensure users of all ages have a safe and meaningful experience" are false and dishonest. Attorney Generals' Offices across the United States have made it abundantly clear that Defendants' representations lack any substance.

36. Despite all the warnings, the numerous incidents of sexual assaults on young underage MySpace users by adult MySpace users, and their widely-publicized claims of safety to the public, MySpace has still not instituted any meaningful changes or additional security measures to effectively increase the safety of their young underage users.

FIRST CLAIM FOR RELIEF

—Defendants MySpace and
News Corp. were negligent—

37. Plaintiffs repeat and reallege the allegations contained in paragraphs "1" through "36" above as if set forth at length herein.

38. Defendants constructed a website that allows people of any age to join and indiscriminately communicate with each other. Defendants actively encourage young underage children and adults to join MySpace and socialize with complete strangers.

39. Defendants expressly and implicitly represented that their website was safe for young underage users, but Defendants had actual and constructive knowledge that they had no meaningful security measures or policies in place to effectively safeguard young underage MySpace users from being contacted by dangerous adult MySpace users.

40. Furthermore, Defendants had actual and constructive knowledge of numerous sexual assaults and attempted sexual assaults of young underage

MySpace users by adult MySpace users who used MySpace to initiate contact with them and draw them out.

41. Defendants owed a legal duty to 14-year-old Julie to institute and enforce appropriate security measures and policies that would substantially decrease the likelihood of danger and harm that MySpace posed to her. This is especially true given that Julie is a minor that lacks the capacity to discern friends from predators posing as friends.

42. Defendants breached their duty by publicly touting the effectiveness of their security measures and policies they knew or should have known were utterly ineffective in deterring the likelihood of danger and harm to 14-year-old Julie. Defendants also breached their duty by failing to act to substantially decrease the likelihood of danger and harm to 14-year-old Julie upon gaining actual and constructive knowledge of the danger and harm. Defendants' representations gave the sense of security when no security exists.

43. Defendants' breach of their duty proximately caused the sexual assault of 14-year-old Julie. The physical, psychological and emotional trauma 14-year-old Julie endured is indescribable and permanent. Defendants are the proximate cause of 14-year-old Julie's injuries.

44. Plaintiffs seek actual and exemplary damages against Defendants.

45. MySpace and News Corp. are jointly and severely liable for these damages.

SECOND CLAIM FOR RELIEF

—Defendants MySpace and News Corp.'s acts constitute gross negligence—

46. Plaintiffs repeat and reallege the allegations contained in paragraphs "l" through "45" above as if set forth at length herein.

47. Defendants have knowingly and purposely ignored the health and safety of young MySpace users in exchange for ensuring open access to MySpace thereby fueling its growth among minors.

48. Defendants' actions, along with their omissions to act, when viewed objectively from their own standpoint, during the timeframe discussed *supra,* involved an extreme degree of risk and callousness. Particularly in light of:

(1) Defendants' actual knowledge, awareness, and conscious indifference of the extreme dangers MySpace posed to young underage MySpace users;

(2) Defendants' actual knowledge, awareness, and conscious indifference that adult MySpace users were able to contact and were regularly contacting young underage MySpace users, obtaining their personal information, and sometimes sexually assaulting them;

(3) Defendants' actual knowledge, awareness, and conscious indifference to the warnings given them by Attorneys General' Offices around the United States;

(4) Defendants' actual knowledge, awareness, and conscious indifference to the misrepresentations they made to Plaintiffs

and the public at large regarding the safety and security of MySpace for young underage MySpace users; and;

(5) Defendants' actual knowledge, awareness, and conscious indifference to not institute even the most minimal and inexpensive of security measures that would have greatly increased the safety of young underage MySpace users from being contacted by, exploited, and sexually assaulted by adult MySpace members.

49. Defendants knew there was a likelihood of serious injury and harm to young underage MySpace users, particularly 14-year-old Julie, and there was more than just a remote possibility of injury. Defendants had actual knowledge of other incidents that occurred in nearly the exact same manner as the incidents complained of herein (sexual assaults of young underage MySpace members by adult MySpace members), and to the exact same class of persons (young underage MySpace users).

50. Defendants' actions, along with their omissions to act, demonstrate a conscious indifference and utter disregard for the rights, safety, and welfare of young underage MySpace users, particularly 14-year-old Julie.

51. Plaintiffs seek actual and exemplary damages against MySpace and News Corp. for gross negligence.

52. MySpace and News Corp. are jointly and severely liable for these damages.

THIRD CLAIM FOR RELIEF

—Defendants MySpace and
News Corp. committed fraud—

53. Plaintiffs repeat and reallege the allegations contained in paragraphs "I" through "52" above as if set forth at length herein.

54. Defendants made express and implied representations to Plaintiffs, both directly and indirectly. Defendants posted express representations on MySpace and made numerous material and false express and implied representations to the public that MySpace was safe for young underage MySpace users. These material and false representations were untrue, deceptive and misleading.

55. Defendants made these material and false representations knowing they were false and/or made them recklessly without knowledge of their truth and as a positive assertion of fact.

56. Defendants made these material and false representations with the intent that Plaintiffs rely upon them and with the expectation that Plaintiffs would act in reliance on them.

57. Defendants knew of MySpace's material and false representations, Plaintiffs relied upon them, and Plaintiffs' reliance was justifiable.

58. Defendants' material and false representations were the direct and proximate cause of Plaintiffs' injuries.

59. Plaintiffs seek actual, direct, consequential and exemplary damages against MySpace and News Corp. for fraud.

60. MySpace and News Corp. are jointly and severely liable for these damages.

FOURTH CLAIM FOR RELIEF

—Defendants MySpace and News Corp. made negligent misrepresentations—

61. Plaintiffs repeat and reallege the allegations contained in paragraphs "1" through "60" above as if set forth at length herein.

62. Defendants made express and implied representations to Plaintiffs in the course of MySpace's business and/or during transactions in which Defendants had an interest. Defendants knew or should have known that Plaintiffs were members of the class of persons that would receive their false and material representations. These false and material representations included misstatements of material facts and were made in regard to the security and safety of MySpace for young underage MySpace users.

63. Defendants supplied this false information for the guidance of others and Plaintiffs in their business.

64. Defendants did not exercise reasonable care or competence in obtaining and/or communicating information regarding the safety and security of MySpace for young underage MySpace users.

65. Plaintiffs justifiably relied on Defendants' negligent misrepresentations and were thereby injured. Defendants' negligent misrepresentations were there proximate cause of Plaintiffs' injuries.

66. Plaintiffs seek actual and exemplary damages against MySpace and News Corp. for negligent misrepresentations.

67. MySpace and News Corp. are jointly and severely liable for these damages.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs hereby request that the Court enter judgment, in their favor and against Defendants MySpace and News Corp. as follows:

A. That Defendants MySpace and News Corp. be held jointly and severally liable to Plaintiffs for all economic and non-economic damages assessed against them;

B. Jane Doe, individually, recover all medical and psychological counseling expenses that have been incurred and may be incurred in the future, on behalf of Julie Doe, while Julie Doe is a minor;

C. Jane Doe, as next of friend of Julie Doe, her minor daughter, recover compensatory and exemplary damages for Julie Doe's pecuniary loss, mental anguish, psychological trauma, pain and suffering, and emotional distress, in the past and the future, as well as future medical and psychological counseling expenses;

D. Pre- and post-judgment interest on all amounts awarded at the maximum interest rate provided by law;

E. Reasonable and necessary attorneys' fees, expenses and costs of suit as provided by law; and

F. On all claims for relief, punitive damages be assessed and such other further and other relief as the Court deems just and proper.

JURY TRIAL DEMANDED

Plaintiffs hereby demand a trial by jury.

Dated: September 25, 2006
Houston, Texas

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ATTORNEYS FOR PLAINTIFFS

ATTORNEY'S VERIFICATION

NICKOLAS G. SPILIOTIS, an attorney duly admitted to practice law in the Courts of the State of New York, affirms under the penalties of perjury as follows:

I am the attorney for the plaintiff in the above captioned action. I have read the foregoing Verified Complaint and know the contents thereof which are true to my knowledge, except as to the matters therein stated to be alleged on information and belief and that as to those matters, I believe them to be true.

The reason this verification is made by me and not by plaintiff is that plaintiff was not present in the County wherein I maintain my offices when the Complaint was prepared.

The source of this information and the grounds of my belief communications with my client and others, papers, reports, and investigation contained in the file.

Dated: September 25, 2006
Houston, Texas

/s/ Nickolas G. Spiliotis
Nickolas G. Spiliotis

March 20, 2006

Attorney Christine Varney
Hogan & Hartson, LLP
Columbia Square
555 Thirteenth Street, NW
Washington, DC 20004

Dear Ms. Varney:

I have appreciated your responding to my concerns about MySpace.com ("MySpace"), providing the opportunity to meet with you and your colleagues, including MySpace.com's Chief Executive Officer Chris DeWolfe, as well as our continuing discussion.

The preliminary steps outlined in your letter are a welcome start, but I am deeply concerned: that they would leave children at risk from pornography and sexual predators and other potential problems. While our discussions have been encouraging, I ask MySpace to take certain specific practical steps to address immediately the most critical concerns identified by my office. These measures are technologically feasible, as well as consistent with your stated terms of service and your own explicit goal of prohibiting nudity and other offensive or inappropriate material your website:

- Provide filtering software on the website that parents can download to block access to MySpace, as well as other websites that include sexually explicit material and other inappropriate content.
- Ban anyone under 16 from MySpace. If 14 and 15 year olds have access to any site, it should be separate and distinct. This new possible

website should also ban children under the age of 14.

- Initiate a member login with age verification to regulate visitors viewing other member profiles, including pictures and access to group materials. Any access to adult content should be vigorously restricted to individuals 18 or older.
- Implement technology to ensure that 14 and 15 year olds are prohibited from changing their profile settings from private to public and no photos or profiles of minors can be viewed by anyone older than 16 without parental consent.
- Increase staffing and employ additional filtering technology to effectively block nudity and sexually explicit images and other violations of MySpace terms of service and preclude people looking for [unknown] from communicating or contacting children. MySpace should also do proactive manual searches of its site for material that violates its terms of service.
- Delete anyone who violates MySpace terms of service, and permanently ban a user from MySpace for continually posting prohibited deep links with pornography or other inappropriate material.
- Establish the new Security Director as an aggressive watchdog independent and separate from the corporate hierarchy reporting directly to the Board of Directors.

- Delete explicit reference to swingers as a browse term and groups or clubs identified as swingers or people seeking sex.
- Fully disclose in clear and conspicuous terms that MySpace contains explicit sexual content and users seeking sexual encounters and prior use of the site by sexual predators to target minors.

Although new technology may be needed to fully protect children, much of it is already available. This site now exposes young people to a perilous cyber environment with people posting sexually explicit materials and looking for sexual relationships. In fact, children can still view pornographic images, links to X-rated websites, "clubs" involving adults seeking sexual encounters, and webcam sex for sale offers. I ask you to adopt my proposed steps immediately even as you develop new technology offering better protections.

I am prepared to continue our constructive discussions and ask that you contact my office. I welcome any other ideas you may have for advancing our shared goal of making MySpace a safe site for all. Again, thank you for taking the time to visit us and being responsive to our concerns. I look forward to making further progress in the coming days.

Sincerely,

RICHARD BLUMENTHAL

[LOGO] JIM PETRO
ATTORNEY GENERAL
STATE OF OHIO

March 24, 2006

Chris DeWolfe
MySpace.com
1333 2nd Street
Santa Monica, CA 90401

Dear Mr. DeWolfe

I am increasingly concerned by reports that young children using MySpace.com have been victims of harassment, sexual solicitation, and even sexual assault. One such incident is currently under investigation by the Broadview (Ohio) police Department involving the alleged rape of a 14 year old Ohio student by an adult male she met on your Website. Although social networking can be a fun way to interact with friends and family, I am concerned that your current operating policies may place children at risk.

Over the last several months, my office and local law enforcement have received complaints from parents regarding the type of information minors can easily access a myriad of inappropriate material such as pornographic images, ads for sexual products, obscene language and various references to the use of illegal substances. This material is in direct conflict with paragraph five of your "Terms of Use Agreement" which states, "a profile may not include the following items: photographs containing nudity or obscene, lewd, excessively violent, harassing,

sexually explicit or otherwise objectionable subject matter."

To address these concerns, I ask that you consider the following actions to safeguard children against potential abuse and exploitation. My office believes these enhancements would be in the best interest of all affected parties.

1. Increase the minimum user age from 14 to 16 and prohibit adult users from accessing the profiles of minors.
2. Explicitly state in the Terms of Use Agreement and during login that the site contains sexually explicit material and that users have no expectation of privacy in regards to information posted on MySpace.com
3. Require that all new users enter a verifiable credit card number during the registration process. Upon successful completion of the verification process, a brochure describing the site and a hard copy of the Terms of Use Agreement should be sent to the card holder.
4. Place a "report misconduct" button on every MySpace page.
5. Increase the company's ability to identify, remove, and respond to violations of MySpace policies by expanding the use of filtering technology.
6. Implement a "zero tolerance" policy regarding the violation of MySpace Terms of Use Agreement. Members violating the policy should be permanently barred from the site and their profiles should be purged from the system.

7. Establish an independent board or commission to assist the company in proactively 'dealing with privacy and security concerns.

8. Prohibit minors from accessing groups, clubs, or, profiles that contain adult content.

Although the convenience of the Internet may be a gateway to limitless information, it can also be fraught with pitfalls that may be dangerous to the unsuspecting user. Under its current conceptualization, MySpace increases youth exposure inappropriate material, placing them at a higher risk of victimization. It is my hope that you immediately move to implement the recommendations listed above.

If you have any questions or concerns, please do not hesitate to contact me.

Very Truly Yours,

JIM PETRO
OHIO ATTORNEY GENERAL

[Logo]

THE OFFICE OF MASSACHUSETTS ATTORNEY GENERAL

AG REILLY DEMANDS CHANGES TO MYSPACE.COM WEBSITE TO PROTECT TEENS FROM ONLINE PREDATORS

Calls on website to take immediate steps to be

May 2, 2006

CONTACT: MEREDITH BAUMANN (617) 727-2543

BOSTON -- Attorney General Tom Reilly is demanding that MySpace.com, the popular social networking site, make dramatic changes to its web site to ensure the safety of minors who use MySpace.

In a letter to company officials, AG Reilly demanded that MySpace increase its minimum user age from 14 to 18 after an investigation he launched in March 2006 revealed that MySpace does not have sufficient safeguards in place to protect children from sexually explicit and other inappropriate content.

AG Reilly's investigation also raised concerns that potential child predators use MySpace to locate and communicate with possible victims and that MySpace is also used to post violent images or content to bully or threaten children.

"MySpace allows 14 and 15 year-olds to register as members of its community and claims to be able to protect their safety" AG Reilly said, "Our investigation revealed that these measures are not effective and do not protect children from being exposed to inappropriate content they just shouldn't see"

AG Reilly called on MySpace to improve the safety and security of its site by:

- Instituting an age and identity verification system
- Equipping every MySpace page with a "report Inappropriate Content" link
- Responding to all reports of inappropriate content within 24 hours;
- Increasing significantly the number of employees who review images and content on the MySpace website;
- Implementing filtering technology that effectively blocks sexually explicit or violent images;
- Immediately deleting any profiles that violate MySpace's Terms of Use Agreement and permanently banning those member from using the site;
- Immediately removing all advertisements and other MySpace sponsored content that are inappropriate for children; and
- Offering free, downloadable software that allows parents to block use of MySpace,

AG Reilly's staff met with MySpace in March 2006 to discuss their concerns with how the website operated. Although MySpace maintains that only member under the age of 18 can view the profiles of members 14-15 years old, AG Reilly's investigation found that MySpace does not have any system in place to verify its members ages. As a result, an adult can register as a minor member and use that profile to seek access to the profiles of countless underage members.

AG Reilly's investigators were able to register as minors 14 and 15 years old. The investigators were

then able to gain access to numerous profiles of children between the ages of 14 and 17 years old.

The investigators also discovered that any user, regardless of age, can browse the MySpace website and find forums where children are posting messages. In these various forums, adults can not only view the child's picture, age and hometown, but they can also communicate with the child.

AG Reilly criticized MySpace's own content on its website for contributing to the exposure of children to inappropriate content and communications. For example, the investigation revealed that MySpace regularly advertises 18+ "Intimate Dating" sites in its High School forums. During the investigation, MySpace's own search parameters allowed 14 and 15 year olds to search the site for "swingers" or designate themselves as "smokers" or "drinkers" in their user profiles.

AG Reilly's office has become a known and respected resource on the ever evolving world of the Internet, particularly as it relates to child safety. Since taking office, AG Reilly has devoted unprecedented resources to protecting Internet users and has dedicated staff specifically to education and training efforts.

As part of an enhanced parental awareness of online safety for children, AG Reilly's Office is leading a series of workshops throughout Massachusetts to educate parents about the dangers that children face when using the Internet today. AG Reilly will conduct an Internet Safety program for parents in Weymouth warning them of the potential dangers that exist when their children use the Internet. In an April sting operation, AG Reilly charged six people

for allegedly using the Internet to possess or disseminate child pornography.

AG Reilly has also worked to make the Internet safe for consumers, recently publishing a revised Consumer Guide to the Internet that provides parents with tips on how to make their children's online activities safer. Safety tips also describe how to avoid identity theft and so called "phishing" schemes.

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[Logo]

ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

May 22, 2006

Mr. Christopher DeWolfe
Chief Executive Officer
MySpace, Inc.
1333 Second St
Santa Monica, California
90401

Mr. Mark Zukerberg
Chief Executive Office
TheFacebook, Inc.
471 Emerson St.
Palo Alto, California
94301-1605

Mr. John Hiler
Chief Executive Officer
Xanga.com
555 8th Ave Fl. 21
New York, New York
10018

Mr. Jordan Abrams
Chief Executive Officer
Friendster, Inc.
1380 Villa St.
Mountain View, California
94041

Dear Sirs

As Attorney General of Texas, I have become increasingly concerned about the reports of sexual predators using social networking sites such as MySpace.com, Xanga, Friendster and Facebook to lure young children into dangerous and potentially life threatening situations. To that end, today I am writing to urge you to take measures to protect the millions of children who use your services daily. By taking a few proactive steps, you can make your websites safer for all users, especially children.

Identity Verification

By not requiring bank account information or a credit card in order to access your services, you have

no way of authenticating the identity or age of your users, thereby providing a blanket of anonymity to those who wish to engage in criminal activity on your website. I request that you take steps to verify the identity of those individuals using your sites to post harmful or illegal images and to engage in two way communications. Although I understand that you currently use an age verification system, our investigators have found it uncomfortably east in a relatively short period of time to locate many underage profiles on your sites. A system of identity/age verification via credit card or a verified email account would be a better system than the current methods used by your websites.

Child Pornography Identification

I understand that software exists which scans photographic images before they are posted on user accounts or anywhere else on your sites. The software assigns a hash value (based on algorithms) to each photograph and them attempts to match it against a database maintained by your sites that contains the hash values of many images of child pornography. This software is already utilized by AOL to prevent images of child pornography from being transmitted via email. You should install the same database that automatically scans all uploaded images prior to allowing then to be posted on your systems. When an image's hash value matches that of a know image of child pornography, the posting of that image could be blocked and the incident reported to the proper authorities.

Oversight of Websites

Finally, I urge you to consider increasing the number of staff dedicated to reviewing images and

profiles which violate the terms of use policies of your websites. With hundreds of thousands of new users registering daily, it is impossible to keep up with this responsibility with current resources.

I know many state officials are calling on you to stand up for the safety and security of our children. I add my voice to theirs and hope you will choose to do what is right for our children. While the young girls of my generation wrote in diaries that protected their life stories under lock and key, the young children of today post the most intimate details of their lives in a public forum, one where sexual predators lurk around every corner. I look forward to hearing from you in the near future about the actions you will be taking on this very important matter.

Sincerely,

GREG ABBOTT
ATTORNEY GENERAL OF TEXAS

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No. 08-340

Supreme Court, U.S.
FILED
OCT 16 2008
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JANE DOE, INDIVIDUALLY AND AS NEXT FRIEND OF JULIE DOE, A MINOR,

Petitioner,

v.

MYSPACE, INC. AND NEWS CORPORATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS MYSPACE, INC. AND NEWS CORPORATION

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Counsel for Respondents

October 16, 2008

* Counsel of Record

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QUESTION PRESENTED

Whether the court of appeals correctly applied the immunity provision in Section 230(c)(1) of the Communications Decency Act, 47 U.S.C. § 230(c)(1), to Petitioner's allegations of harm resulting from the publication of user-generated content on MySpace's website.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondents make the following disclosures:

MySpace, Inc. states that its parent corporation is News Corporation, a publicly traded company. No publicly traded entity owns more than 10 percent of News Corporation stock.

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STATUTE

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INTRODUCTION

Petitioner seeks this Court's review of a decision of the Fifth Circuit that appropriately applied a well-established standard for immunity for interactive computer services under Section 230 of the Communications Decency Act ("CDA"). *See* 47 U.S.C. § 230(c)(1). As the Fifth Circuit summarized, "Courts have construed the immunity provisions in § 230 broadly in all cases arising from the publication of user-generated content." Pet. App. 8a. The Petition points to no actual conflicts in the courts of appeals, and the Fifth Circuit evinced no indication that it intended to deviate, or was potentially deviating, from the established standard. To the contrary, in the proceedings below, the court noted that Petitioner "appear[s] to agree with the consensus among courts regarding the liability provisions in § 230(c)(1)." *Id.* at 10a.

Like a Chicago Cubs' fan at the beginning of the season, Petitioner imagines that this time things are different, and that her claims against MySpace do not involve treating it as a publisher, despite numerous cases holding analogous website operators to be publishers within the meaning of § 230. The district court aptly labeled this "artful pleading" (Pet. App. 27a), and dismissed the effort to attempt to create fact-driven exceptions to § 230's clear statutory immunity (*id.* at 28a).

Petitioner's real complaint is with the policy decision made by Congress in enacting the broad immunity of § 230 to protect online service providers from liability for the content and consequences of third-party information communicated through their online service. This protection was specifically enacted to encourage the development of the Internet

as a free and open environment for the exchange of information and ideas. The appropriate forum in which Petitioner should lodge her complaint is Congress, not this Court. Certiorari should be denied.

STATEMENT OF THE CASE

Respondent MySpace, Inc. owns and operates MySpace.com, the world's largest social networking website. Respondent News Corporation is MySpace, Inc.'s ultimate parent company. Pet. App. 19a n.2. When Petitioner filed this lawsuit, MySpace.com had over 100 million users (*id.* at 43a) and was the most visited website in the United States (*id.* at 19a).

Online social networking is the practice of using a website or other interactive computer service to expand one's business or social network. Pet. App. 1a-2a. Social networking on MySpace.com begins with registration, during which a visitor to the site is required to provide to MySpace her name, age and e-mail address. Once registered, a MySpace.com member can create an online profile. *Id.* at 2a. A profile is an individual web page that serves as a medium for personal expression; a typical MySpace profile contains photographs, videos, and other information about the member that she chooses to share with other MySpace users. *Id.* As the court of appeals observed, "[m]embers have complete discretion regarding the amount and type of information that is included in a personal profile." *Id.*

The profile also serves as the vehicle through which the member can establish and expand her online social network. Once a member has created a profile, she can use it to extend "friend invitations" to existing friends who are MySpace members and to

communicate with them by linking to their online profiles, or by using e-mail, instant messaging, and blogs, all of which are hosted on the MySpace platform. Pet. App. 2a. Members can also add new friends to their MySpace "Friends List" in several ways. For instance, members can meet new friends online through MySpace user groups formed around common interests. *Id.* MySpace members can also become online "friends" with celebrities, artists, musicians and politicians who have created MySpace profiles to publicize themselves and to interface with supporters. *Id.*

Membership in MySpace.com is free to all who agree to the MySpace Terms of Use. Pet. App. 2a. These Terms of Use include measures designed to maintain a degree of civility on the site, and importantly, to enhance its safety. The MySpace Terms of Use expressly caution all members about the type of information they release to other users on the Web site and contain a specific prohibition against posting personal information such as telephone numbers, street addresses, last names, or e-mail addresses. *Id.* at 3a. MySpace members also are encouraged to report inaccurate, inappropriate, and obscene material to MySpace administrators. *Id.*

At the time the instant lawsuit was initiated, MySpace's Terms of Use required that members be 14 years of age or older. Pet. App. 2a-3a. To protect younger teens from being contacted by adult members whom they do not know, MySpace set the profiles of 14- and 15-year-old members to "private" by default. *Id.* at 3a. While MySpace has implemented sophisticated computer programs that are designed to search for clues that underage members have lied about their ages to join the site, the company also made clear that these programs are

not foolproof and that no website has developed technology to verify the age of all users reliably. *Id.* For example, the MySpace "Tips for Parents" explain that children should not lie about their age because doing so will circumvent MySpace's default safety features:

> Kids shouldn't lie about how old they are. MySpace members must be 14 years of age or older. We take extra precautions to protect our younger members and we are not able to do so if they do not identify themselves as such. MySpace will delete users whom we find to be younger than 14, or those misrepresenting their age.

Opposition App. 1a (emphasis omitted).[1]

It is undisputed that Julie Doe ignored MySpace's Terms of Use and created a MySpace profile when she was only 13 years old by misrepresenting herself to be 18 years old. Pet. App. 3a. Doe's decision to lie about her age enabled her to circumvent MySpace's safety features directed toward its younger teen members. *Id.* Not only did it allow her to create a MySpace profile when she was only 13, but also it made her profile public for all MySpace users to view. *Id.* Had Doe waited until she was 14 to create her member profile and honestly represented her age, the

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[1] Despite the potential for users to lie about their ages, Petitioner's allegation that children who have been "denied access to the site [for being underage may simply] reenter the same information with a false (and earlier) birth date" to obtain "full access to the website" is outside the record and false. *Cf.* Pet. 4. In order to prevent that very scenario, MySpace.com sends an "HTTP cookie" to the previously rejected applicant's computer, which prevents the rejected applicant from simply reapplying using a different age.

information in her profile would have been visible only to users on her "Friends List." *Id.*

Petitioner alleges that 19-year-old Pete Solis initiated contact with Julie Doe through MySpace.com in April 2006. Pet. App. 3a. At the time, Doe was 14 years old, but because she created her profile representing that she was 18, her profile was made public, and Solis was able readily to contact her online. *Id.* The two subsequently communicated offline on several occasions after Doe provided Solis with her telephone number. *Id.* They arranged to meet in person on May 12, 2006. Petitioner alleges that Solis sexually assaulted Doe during that meeting. *Id.* at 3a, 20a. Solis was subsequently arrested and indicted for sexual assault. *Id.* at 20a.

It is therefore undisputed that Doe and Solis met through their user-generated communications over MySpace.com, that Doe's violation of key provisions in the MySpace Terms of Use made those communications possible, and that MySpace's publication of Doe's profile was a necessary part of the causal chain leading to the alleged sexual assault. Petitioner and the district court succinctly summarized this factual background at the hearing on MySpace's motion to dismiss:

> THE COURT: I want to get this straight. You have a 13-year-old girl who lies, disobeys all of the instructions, later on disobeys the warning not to give personal information, obviously, [and] does not communicate with the parent. More important, the parent does not exercise the parental control over the minor. The minor gets sexually abused, and you want somebody else to pay for it? This is the lawsuit that you filed?

[Counsel for Petitioner]: Yes, your Honor.

Pet. App. 13a (first alteration in original).[2]

Petitioner first sued Solis and MySpace in state court in Travis County, Texas. Pet. App. 4a. Petitioner's Original Petition asserted claims for sexual assault and intentional infliction of emotional distress against Solis and claims for fraud, negligent misrepresentation, negligence, and gross negligence against MySpace. *Id.* MySpace filed special exceptions to Petitioner's Original Petition, asserting, among other things, that Petitioner's claims were barred by Texas common law and the CDA. *Id.* After Petitioner amended her Original Petition, MySpace filed a second set of special exceptions. *Id.*

In response, Petitioner nonsuited her claims in Texas and filed the present suit in New York Supreme Court in Bronx County, asserting the same

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[2] Petitioner's allegations about MySpace's knowledge of other alleged assaults of MySpace.com members are based on events that primarily occurred after Doe's alleged assault and are largely outside the record. Nine of the 14 specific incidents alleged in Petitioner's Complaint occurred after Doe allegedly met Solis online. Pet. 6 (citing Pet. App. 46a-49a). Furthermore, the allegation that MySpace discovered 29,000 sexual predators on its site (*id.*) is outside the record, and fails to mention that MySpace was the first company to commission the creation of the software that enabled it and other websites to identify sexual predators online, to proactively remove them from its website, and to provide their names to law enforcement. *See* Caroline McCarthy, *MySpace Responds to States' Request for Sex Offender Data*, cnet news, May 15, 2007, *at* http://news.cnet.com/8301-10784_3-9719654-7.html. This was one of the many industry-leading safety measures that MySpace instituted to protect its users, and one of the many measures that earned MySpace the commendation of 50 State Attorneys General. *See* http://www.mass.gov/Cago/docs/press/2008_01_14_myspace_agreement_attachment1.pdf.

claims against MySpace that she had asserted in Texas state court, but not naming Solis as a defendant. Pet. App. 4a. Doe apparently has not pursued her voluntarily dismissed claims against Solis.

The federal action began when MySpace removed the case to the Southern District of New York and simultaneously moved to dismiss pursuant to Rule 12(b)(6) and to transfer to the Western District of Texas pursuant to 28 U.S.C. § 1404(a). Pet. App. 4a. The New York district court granted MySpace's motion to transfer venue, but left the motion to dismiss to the transferee court in the Western District of Texas. *Id.*

On February 13, 2007, the Western District of Texas dismissed Petitioner's negligence and gross negligence claims with prejudice pursuant to section 230(c)(1) of the CDA, holding that Petitioner's claims sought to hold MySpace liable in its capacity as a publisher of third-party content. Pet. App. 27a-28a. The district court characterized as "disingenuous" Petitioner's argument that her claims were not directed towards MySpace in its capacity as a publisher, stating that "[i]t is quite obvious the underlying basis of Plaintiffs' claims is that, through postings on MySpace, Pete Solis and Julie Doe met and exchanged personal information which eventually led to an in-person meeting and the sexual assault of Julie Doe." *Id.* at 27a. The district court separately held that Petitioner's claims were barred under section 230(c)(2) of the CDA because Petitioner sought to hold MySpace liable for instituting allegedly ineffective security measures relating to age verification. *Id.* at 28a. In ruling on this alternative ground, the district court acknowledged that section 230(c)(2) immunity from liability for "'any action

voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be . . . harassing, or otherwise objectionable'" reflects "Congress's recognition that the potential for liability attendant to implementing safety features and policies created a disincentive for interactive computer services to implement any safety features or policies at all." *Id.*[3]

A unanimous panel of the United States Court of Appeals for the Fifth Circuit affirmed the district court's judgment on May 16, 2008 (Pet. App. 1a), holding that Petitioner's claims were barred by section 230(c)(1) of the CDA. The court of appeals held that Petitioner's claims that MySpace was negligent in allegedly failing "to implement measures that would have prevented Julie Doe from communicating with Solis" were "merely another way of claiming that MySpace was liable for publishing the communications and they speak to MySpace's role as a publisher of online third-party-generated content." *Id.* at 12a.

The Fifth Circuit declined to consider the argument, which Petitioner raised for the first time on appeal, that MySpace was not immune under the CDA because it allegedly partially created the content at issue. In making this argument, Petitioner relied primarily on *Fair Housing Council* v. *Roommates.com, LLC*, 521 F.3d 1157 (9th Cir.

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[3] The district court also dismissed Petitioner's negligence and gross negligence claims on the independent basis that MySpace has no duty under Texas common law to protect Doe from Solis's criminal acts or to institute reasonable safety measures on its website. Pet. App. 29a-33a. Finally, the court dismissed Petitioner's fraud and negligent misrepresentation claims without prejudice, noting that Petitioner no longer wished to pursue those claims. *Id.* at 33a.

2008) (en banc) (involving a website that required completion of drop-down boxes that contained discriminatory pre-filled answers about personal characteristics of potential roommates). After reviewing the record, however, the Fifth Circuit held that Petitioner waived this argument by failing to present it to the district court. Pet. App. 16a. Petitioner does not appear to challenge that holding in this Court.

Having held that Petitioner's claims were barred under section 230(c)(1) of the CDA, the Fifth Circuit declined to consider the two independent, alternative bases for the district court's ruling—i.e., that Petitioner's claims were also barred under section 230(c)(2) of the CDA and that MySpace owed no duty of care to the Does under Texas common law. Pet. App. 17a.

REASONS FOR DENYING THE PETITION

I. THERE IS NO CONFLICT AMONG THE COURTS OF APPEALS ON THE SCOPE OF PROTECTION AFFORDED TO INTERACTIVE COMPUTER SERVICES UNDER SECTION 230(c)(1) OF THE COMMUNICATIONS DECENCY ACT.

Petitioner's principal argument for certiorari is an imagined conflict among the courts of appeals over the scope of the immunity afforded to interactive computer services from liability for all aspects of the publication of third-party content. Pet. 11. Petitioner concedes that the decision below is in accord with the decisions of numerous other courts on the question of the scope of § 230 immunity. *Id.*; *see also* Pet. App. 10a-11a. However, Petitioner claims that all of these cases conflict with the Seventh Circuit's decision in *Chicago Lawyers' Committee For*

Civil Rights Under Law, Inc. v. *Craigslist, Inc.*, 519 F.3d 666 (7th Cir. 2008). But even this alleged outlier (which in truth is perfectly congruent with the consistent body of § 230 case law) also granted immunity to an interactive computer service based on claims arising from the publication of third-party content. Pet. 11.

All of the courts of appeals that have considered the issue have recognized that the plain language of § 230(c)(1) of the CDA provides broad protection to interactive computer services for all claims stemming from their publication of information supplied by third-party "information content provider[s]." *See* 47 U.S.C. § 230(c)(1). In language that is manifestly broad, § 230(c)(1) specifically states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." *Id.* Under the CDA, "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." *Id.* § 230(e)(3). No narrowing of that requirement would be faithful to its text.

Petitioner struggles to manufacture a conflict among court decisions interpreting this statutory language, but in fact courts have been overwhelmingly consistent in their construction of the scope of immunity for interactive computer services under § 230. Courts uniformly have held that any claim seeking to impose liability on an interactive computer service for harm resulting from information provided by a third party necessarily treats that interactive computer service as a publisher of that information within the meaning of § 230(c)(1) of the CDA, and therefore is barred.

1. The first appellate court to consider the scope of immunity under § 230(c)(1) was the Fourth Circuit in *Zeran* v. *America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997). In *Zeran*, an unidentified individual advertised merchandise featuring offensive slogans related to the 1995 bombing of the Alfred P. Murrah Federal Building in Oklahoma City, with instructions to contact Zeran at his home telephone number for further information. *Id.* at 329. Zeran brought a negligence action against AOL based on AOL's delay in removing the messages, refusal to post a retraction and failure to screen for similar messages. *Id.* at 328.

The Fourth Circuit affirmed the district court's judgment in favor of America Online based on § 230 immunity. The Fourth Circuit observed that "[b]y its plain language, § 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service." *Id.* at 330. The congressional purpose in enacting such a broad immunity provision for interactive computer services was readily apparent to that court:

> Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium. The imposition of tort liability on service providers for the communications of others represented, for Congress, simply another form of intrusive government regulation of speech. Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum.

Id. Thus, the court rejected Zeran's attempt to hold AOL responsible for allowing the contents of the third party messages to be communicated through its

website, as "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred." *Id.*

Numerous other federal and state courts have followed the Fourth Circuit's lead in *Zeran* and have recognized § 230(c)(1)'s broad protection for interactive computer services in the exercise of all aspects of their traditional "publisher" functions. *See Fair Housing Council* v. *Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008) (en banc); *Chicago Lawyers' Committee For Civil Rights Under Law, Inc.* v. *Craigslist, Inc.*, 519 F.3d 666 (7th Cir. 2008); *Universal Commc'n Sys., Inc.* v. *Lycos, Inc.*, 478 F.3d 413 (1st Cir. 2007); *Carafano* v. *Metrosplash.com, Inc.*, 339 F.3d 1119 (9th Cir. 2003); *Batzel* v. *Smith*, 333 F.3d 1018 (9th Cir. 2003); *Green* v. *America Online*, 318 F.3d 465 (3d Cir. 2003); *Ben Ezra, Weinstein, & Co.* v. *America Online Inc.*, 206 F.3d 980, 985-86 (10th Cir. 2000); *Barrett* v. *Rosenthal*, 146 P.3d 510 (Cal. 2006); *Doe* v. *America Online, Inc.*, 783 So.2d 1010 (Fla. 2001).

As each of these courts recognized, § 230(c)(1) bars a claim if (1) the defendant is a provider of an interactive computer service; (2) the claim is based on information provided by another information content provider; and (3) the claim would treat the interactive computer service as the publisher of that information. *See, e.g.*, *Lycos*, 478 F.3d at 418. For example, in *Ben Ezra*, 206 F.3d at 985-86, the Tenth Circuit relied on § 230(c)(1) in rejecting a suit against AOL for publishing incorrect information provided by a third party concerning Plaintiff's stock price and share volume, even where AOL was found to have engaged in some editorial functions with respect to the stock

data. Similarly, in *Carafano*, 339 F.3d at 1125, the Ninth Circuit invoked § 230(c)(1) in affirming the dismissal of claims against a website that failed to prevent the posting of a false personal advertisement about actress Christine Carafano that resulted in harassing and threatening messages to her. And, in *Lycos*, 478 F.3d at 420, the First Circuit likewise found that § 230(c)(1) immunized interactive computer services that operated message boards from liability for the user-generated content on those message boards.

Petitioner mischaracterizes § 230 as limited to those claims of harm resulting from the "content of a particular publication." Pet. 14. This narrow reading of the language of § 230 has no support in the text of the statute or in the long line of cases interpreting it. To the contrary, courts have been overwhelmingly consistent and clear in applying § 230 immunity in cases where the alleged harm resulted from any action taken by an interactive computer service in its capacity as "publisher" of information provided by another information content provider—including not only harms allegedly resulting from the content of the third-party information, but also harms resulting from access to and communication of that information. That is, under § 230, there is no liability where the alleged harm stems from the interactive computer service's "decisions relating to the monitoring, screening, and deletion of content from its network—actions quintessentially related to a publisher's role." *Green*, 318 F.3d at 471; *see also Ben Ezra*, 206 F.3d at 986 ("Congress clearly enacted § 230 to forbid the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions."); *Carafano*, 339 F.3d at 1123 ("§ 230(c) provides broad immunity for

publishing content provided primarily by third parties").

Courts have applied § 230(c)(1) to immunize interactive computer services from claims of harm resulting from actions taken in their capacity as "publisher" of third-party content even where, as here, the plaintiff attempted to frame her claim in such a way as to avoid the reach of § 230. In *Green*, for example, the Third Circuit declined to hold AOL liable to an individual using the service who received a computer virus and was subject to derogatory postings about him in an AOL chat room. *Green*, 318 F.3d at 473. Similar to Doe in this case, Green sued AOL, claiming that the interactive computer service failed to take measures sufficient to protect him from such user-generated information. *Id.* at 469. The Third Circuit rejected Green's attempt to plead around § 230, finding "no real dispute" that Green was seeking to hold AOL liable for "decisions relating to the monitoring, screening, and deletion of content from its network—actions quintessentially related to a publisher's role." *Id.* at 471. As the Third Circuit recognized, "Section 230 'specifically proscribes liability' in such circumstances." *Id.* (quoting *Zeran*, 129 F.3d at 332-33).

2. Contrary to Petitioner's suggestion (Pet. 20), the Seventh Circuit's decision in *Craigslist* is consistent with the court of appeals below and all of the other courts of appeals that have interpreted the immunity provision of § 230. In *Craigslist*, Plaintiffs sought to hold the online service liable for advertisements posted on the craigslist.com website that allegedly violated the Fair Housing Act. *See Craigslist*, 519 F.3d at 668. The Seventh Circuit applied § 230 to the activities of Craigslist in publishing advertisements of its users that allegedly

violated federal housing laws, noting (as other courts of appeals have) the difficulties inherent in making online services liable for the import or implications of third-party postings. *Id.* at 668-69. Thus, the court held that under § 230(c)(1), Craigslist cannot be subject to suit for any unlawful content in the third party's postings. *Id.* at 672.

Despite the court's recognition of immunity, Petitioner claims a conflict between the Seventh Circuit's decision in *Craigslist* and the decision in the instant case because certain dicta in *Craigslist* suggested that the Seventh Circuit's holding was limited to the case before it and, according to Petitioner, "recognize[d] that § 230(c)(1) provides, at most, a limited immunity, from claims that bear no resemblance to Doe's." Pet. 11. It is hardly controversial, based on the plain language of the statute, that the Seventh Circuit stated, in dicta, that "§ 230(c) as a whole cannot be understood as a general prohibition of civil liability for web-site operators and other online content hosts." *Craigslist*, 519 F.3d at 669.[4]

Just as clearly, this statement does not conflict with the holding of the Fifth Circuit nor any of the other cases interpreting the scope of § 230. The court below certainly did not purport to apply a "general prohibition of civil liability" to MySpace; rather, it held merely that where a claim is directed at MySpace acting in its "'publishing, editorial, and/or screening capacities,'" that claim is barred by § 230(c)(1). Pet. App. 11a. This result is consistent

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[4] Indeed, the text of the statute restricts the protection afforded to interactive computer services in cases involving intellectual property infringements and criminal law violations. *See* 47 U.S.C. § 230(e)(1), (2).

with the holding in *Craigslist* immunizing the website for harms resulting from the posting of content by third parties. *See Craigslist*, 519 F.3d at 672.

The Ninth Circuit, in an en banc opinion issued after the Seventh Circuit's decision in *Craigslist*, confirms that the scope of § 230 immunity for interactive computer services extends to all aspects of the publication of user-generated content. *Roommates.com*, 521 F.3d at 1174-75. Similar to *Craigslist*, *Roommates.com* involved allegations that the website should be liable for posting user-generated advertisements that violated provisions of the Fair Housing Act. While the Ninth Circuit did not extend § 230 immunity to content that the website itself allegedly created by mandating illegal responses from its users (*id.* at 1164), *Roommates.com* affirmed the settled understanding in § 230 jurisprudence that "any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online is perforce immune under section 230." *Id.* at 1170-71. Significantly, the Ninth Circuit itself noted that its decision was fully in line with prior judicial interpretations of the CDA's immunity provisions. *Id.* at 1172 n.33.[5]

3. The court of appeals' decision in this case is nothing more than an application of the consistent interpretation of the same test for § 230 immunity as applied by the other courts. Doe's lawsuit against

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[5] Doe argued for the first time before the Fifth Circuit that MySpace should be liable as an "'information content provider.'" Pet. App. 12a. After noting that there was no support for that claim (*id.* at 12a-16a), the Fifth Circuit held that Doe was barred from presenting the argument for the first time on appeal. *Id.* at 16a.

MySpace seeks to hold the interactive computer service responsible for allowing the publication of Julie Doe's profile, and not blocking the subsequent communications between Doe and Solis that ultimately led to the personal encounter and the sexual assault of Julie Doe.

Following the decisions in *Carafano*, *Zeran*, and *Green*, among others, the court of appeals recognized that "[c]ourts have construed the immunity provisions in § 230 broadly in all cases arising from the publication of user-generated content." Pet. App. 8a. The court noted that Doe did not appear to disagree with the consensus interpretation of § 230 immunity. *Id.* at 10a. Rather, she argued that she was not suing MySpace in its capacity as publisher, but instead based her claims on MySpace's alleged failure to implement safety measures to protect Julie Doe. *Id.*

Much like the courts in *Zeran* and *Green*, however, the Fifth Circuit rejected Doe's attempt at "artful pleading" to avoid application of the immunity provision of § 230 to MySpace. The court of appeals affirmed the district court's rejection of Doe's description of her claims as "disingenuous," where it was "quite obvious" that Doe sought to hold MySpace liable for the exercise of its traditional publisher roles—deciding whether to publish Julie Doe's profile and establishing rules for access to and communicating with that profile. Pet. App. 10a. Noting that other courts have rejected other plaintiffs' similar attempts to plead around § 230 by fashioning their claims as "failure to protect" arguments (Pet. App. 11a-12a (citing *Green*, 318 F.3d at 471; *Zeran*, 129 F.3d at 333)), the Fifth Circuit affirmed the findings of the district court that Doe's true complaint against MySpace was for its

publication of the underlying postings by Julie Doe and Solis, without which there would have been no harm to Julie Doe. *Id.* at 10a-11a. The court held that Doe's attempt to plead her case as concerns about MySpace's allegedly lax security measures is simply another way of alleging that MySpace was negligent or otherwise deficient in its traditional publisher role. As such, Doe's claims are barred under § 230(c)(1).

Furthermore, although the Fifth Circuit did not reach the issue (*see* Pet. App. 17a), Doe's claims against MySpace also fail under § 230(c)(2) of the CDA. *See* 47 U.S.C. § 230(c)(2). That provision affords immunity to interactive computer services for actions taken in good faith to screen objectionable content from their sites.[6] As the district court recognized, to the extent Doe seeks to hold MySpace liable for implementing security measures that failed to prevent Julie Doe from lying about her age and thereby receiving communications from Solis, such claim would be barred by § 230(c)(2). Pet. App. 28a.[7]

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[6] The purpose of § 230(c)(2) was to eliminate any deterrents that might exist for interactive computer services if they faced liability for attempting to screen or otherwise police their sites for objectionable content. *See Zeran*, 129 F.3d at 331 (noting the policy objective of "'remov[ing] disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material'") (quoting 47 U.S.C. § 230(b)(4)).

[7] The district court also found that MySpace had no duty under Texas state law to protect Julie Doe from Solis's criminal acts or to institute reasonable safety measures on its website. Pet. App. 32a.

II. THE FIFTH CIRCUIT'S DECISION REFLECTS THE PROPER BALANCE OF CONGRESSIONAL OBJECTIVES IN ENACTING § 230.

Section 230 of the CDA represents Congress' considered judgment that it would be better for the "unfettered and unregulated development of free speech on the Internet" if courts were not left to second-guess whether the operator of an interactive computer service should have deleted or never posted specific information generated by third-parties. *Batzel*, 333 F.3d at 1027. Petitioner presents the policy behind § 230 as merely to "encourag[e] providers of interactive computer services to take steps to protect users, and especially children, from being harmed by other users of their services." Pet. 1. While partially true, this reading ignores the plain language of the statute, which sets out the policy underlying § 230 and the immunity provided in § 230(c)(1): to protect and promote a vibrant Internet where torrents of user-generated information, or even misinformation, can flow unobstructed by government interference.[8]

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[8] Petitioner is correct in her assertion that the Seventh Circuit in *Craigslist* recognized that one of the purposes of § 230 was "to protect providers of interactive computer service from being held liable for having made some attempt to protect its users from third-party tortious conduct." Pet. 20. That was Congress' express purpose in adopting § 230(c)(2)—to eliminate any incentive for interactive computer services to abstain from engaging in monitoring and other protective measures due to a fear of being found insufficient once an attempt was made. Indeed, this portion of the Seventh Circuit's decision in *Craigslist* is entirely consistent with the prior cases on § 230, which recognized distinct congressional intent in enacting § 230(c)(1) and § 230(c)(2). *See, e.g.*, *Zeran*, 129 F.3d at 331 ("Another important purpose of § 230 was to encourage service

In the enacted preamble to § 230, Congress sets out findings regarding the importance of interactive computer services to Americans' "educational and informational resources", "diversity of political discourse", "cultural development", and "intellectual activity." 47 U.S.C. § 230(a). These findings also note the user control inherent in these services, and the success of these forums with minimum governmental regulation. *Id.* Congress then explicitly sets out the policy behind § 230, including "to promote the continued development of the Internet and other interactive computer services and other interactive media," and "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." *Id.* § 230(b)(1), (2). Congress thus was quite clear that its intention in creating the immunity provisions of § 230 was to foster interactive computer services' role as a forum for the free and prolific exchange of ideas, communication and commerce.

The immunity provisions in § 230(c)(1) represent Congress' decision to encourage the expansion of online services that can exist in the limitless, decentralized capabilities of the Internet. Congress recognized that no website reasonably could be expected to monitor the staggering amount of user-generated content published online, and made the policy choice in enacting § 230(c)(1) to promote the continued growth of the Internet by ensuring that these websites would be immune from liability for

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providers to self-regulate the dissemination of offensive material over their services."); *Batzel*, 333 F.3d at 1028 (recognizing the dual legislative purposes in enacting §230).

certain actions stemming from user-generated content on the site.[9]

The decisions interpreting § 230(c)(1) have respected this policy choice. In *Zeran*, for example, the Fourth Circuit noted that "Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum." *Zeran*, 129 F.3d at 330; *see also Batzel*, 333 F.3d at 1027 (explaining that Congress sought to "encourage the unfettered and unregulated development of free speech on the Internet."); *Roommates.com*, 521 F.3d at 1175 ("[T]he intent of Congress [was] to preserve the free-flowing nature of Internet speech and commerce without unduly prejudicing the enforcement of other important state and federal laws."). The Ninth Circuit also elaborated on the reasoning behind § 230 in *Carafano*:

> "The specter of tort liability in an area of such prolific speech would have an obvious chilling effect. It would be impossible for service providers to screen each of their millions of postings for possible problems. Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the

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[9] *See* 141 Cong. Rec. 22,044, 22,046 (1995) (Rep. Goodlatte) ("There is no way that any of those [interactive computer services] can take the responsibility to edit out information that is going to be coming in to them from all manner of sources on their bulletin board. We are talking about something that is far larger than our daily newspaper. We are talking about something that is going to be thousands of pages of information every day, and to have that imposition imposed on them is wrong.").

> number and type of messages posted. Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect."

Carafano, 339 F.3d at 1124 (quoting *Zeran*, 129 F.3d at 330-31).[10]

Furthermore, the immunity provisions of § 230(c)(1), as interpreted by the courts of appeals, do not leave those harmed in the course of online communications without recourse. The actual tortfeasor, the originator of the content, is still liable. As in this case, those injured by communications in an online forum can pursue their claims directly, and law enforcement can directly prosecute for criminal acts. *See Zeran*, 129 F.3d at 330.

* * * *

This Petition challenges a clear statutory immunity that the courts of appeals have applied in a consistent manner. Courts have recognized the plain application of this immunity even in the face of

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[10] Congress also has endorsed the judiciary's broad and practical interpretation of the immunity provisions in § 230(c)(1) in subsequent legislation. In a report accompanying the "Dot Kids Act" in 2002, the House Committee stated:

> The Committee notes that ISPs have successfully defended many lawsuits under section 230(c). The courts have correctly interpreted section 230(c), which was aimed at protecting against liability for such claims as negligence (*See, e.g., Doe* v. *America Online*, 783 So.2d 1010 (Fla. 2001)) and defamation (*Ben Ezra, Weinstein, and Co.* v. *America Online*, 206 F.3d 980 (10th Cir. 2000); *Zeran* v. *America Online*, 129 F.3d 327 (1997)). The Committee intends these interpretations of section 230(c) to be equally applicable to those entities covered by [this new legislation].

H.R. Rep. No. 107-449, at 13 (2002), *reprinted in* 2002 U.S.C.C.A.N. 1741, 1749.

creative pleadings that attempt to contrive the basis of their claims. And Congress' grant of this immunity for the express purpose of fostering industry self-regulation while preserving Internet forums as places for free and prolific exchange of ideas has worked. We respectfully urge this Court to decline to ignore the plain language of the statute, the consensus of the courts of appeals, and the unmistakable vision for the Internet that Congress sought to foster.

CONCLUSION

The petition for a writ of certiorari should be denied.

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October 16, 2008

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APPENDIX

APPENDIX

myspace.com
a place for friends

TIPS FOR PARENTS

For teens, MySpace is a popular online hangout because the site makes it easy for them to express themselves and keep in touch with their friends.

As a parent, please consider the following guidelines to help your children make safe decisions about using online communities.

- *Talk to your kids about why they use MySpace, how they communicate with others and how they represent themselves on MySpace.*
- *Kids shouldn't lie about how old they are. MySpace members must be 14 years of age or older.* We take extra precautions to protect our younger members and we are not able to do so if they do not identify themselves as such. MySpace will delete users whom we find to be younger than 14, or those misrepresenting their age.
- *MySpace is a public space.* Members shouldn't post anything they wouldn't want the world to know (e.g., phone number, address, IM screen name, or specific whereabouts). Tell your children they should avoid posting anything that would make it easy for a stranger to find them, such as their local hangouts.
- *Remind them not to post anything that could embarrass them later or expose them to danger.* Although MySpace is public, teens

sometimes think that adults can't see what they post. Tell them that they shouldn't post photos or info they wouldn't want adults to see.

- *People aren't always who they say they are. Ask your children to be careful about adding strangers to their friends list.* It's fun to connect with new MySpace friends from all over the world, but members should be cautious when communicating with people they don't know. They should talk to you if they want to meet an online friend in person, and if you think it's safe, any meeting should take place in public and with friends or a trusted adult present.
- *Harassment, hate speech and inappropriate content should be reported.* If your kids encounter inappropriate behavior, let them know that they can let you know, or they should report it to MySpace or the authorities.
- *Don't get hooked by a phishing scam.* Phishing is a method used by fraudsters to try to get your personal information, such as your username and password, by pretending to be a site you trust. *Click here* to learn more.

Click Here to remove your *child's profile* from MySpace

For more information on Monitoring software, please visit:

- *Software4parents.com*
- *k9webprotection.com*

To learn more please visit these other resources:

- *OnGuard Online*: FTC safety tips for parents
- *Netsmartz.org*
- *WiredSafety.org*
- *The Child Safety Network*
- *GetNetWise.org*
- *SafeTeens.com*
- *BlogSafety.Com*
- *Common Sense Media*

You can also check out the new book by Larry Magid and Anne Collier:

MySpace Unraveled: What It Is and How to Use It Safely

[May 2006]

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No. 08-340

IN THE

Supreme Court of the United States

JANE DOE, INDIVIDUALLY AND AS NEXT FRIEND OF JULIE DOE, A MINOR,
Petitioner,

v.

MYSPACE, INC. AND NEWS CORPORATION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

The Fifth Circuit's interpretation and application of Section 230 of the Communications Decency Act of 1996 is the culmination of a long line of cases on one side of an intercircuit conflict that has recklessly distorted a statute that was intended to foster protection of child Internet users into a catch-all immunity with the precise opposite effect. While the Seventh Circuit has definitively staked out its position that, whatever it does, §230's prohibition on treating interactive service providers as publishers or speakers does not endow those providers with

blanket immunity from all civil liability, other courts, beginning with the Fourth Circuit, have steadily expanded §230's reach beyond any connection with the statutory text. Building on the case law siding with *Zeran* v. *America Online, Inc.*, 129 F.3d 327 (CA4 1997), the Fifth Circuit has now taken the final step away from both the statutory text and the Seventh Circuit's restrictive interpretation of it by effectively holding that §230 immunizes providers from nonvicarious tort liability under, at least, any fact pattern involving third-party communications. Because the Internet is fundamentally a communications medium, that holding removes any meaningful limit on the scope of §230 immunity. In particular, it absolves interactive service providers of any civil liability for negligent—or even willful—failure to protect children from harm by third-party predators, directly contrary to the statutory text and congressional intent.

Respondents' brief in opposition demonstrates precisely why the Court needs to address the interpretation of §230. There is no dispute in any quarter that 47 U.S.C. §230(c)(1), by its plain terms, reaches claims that would "treat[]" an interactive service provider "as the publisher or speaker of any information provided by another information content provider." But respondents, like the Fifth Circuit in its opinion, fail to grapple with the issue of what distinguishes claims that treat a provider as a publisher or speaker and those that do not. Other courts have, at a minimum, applied §230 only in circumstances in which the content of third-party communications was itself relevant to a cause of action. The Seventh Circuit has suggested that §230 may be even more limited than that, and, indeed, that it may be improper to view §230(c)(1) as

conferring immunity at all. The Fifth Circuit's failure to distinguish Doe's claims—alleging that MySpace's liability arises not from the content of the communications between Julie Doe and her attacker but from MySpace's negligent and grossly negligent facilitation and encouragement of any contact between those individuals—from content-based claims has taken §230 farther than any other court has been willing to go.

As the Internet matures and, indeed, becomes a dominant medium for social and commercial interaction in our society, there is little reason to hold Internet-based businesses to a lower standard of care with respect to patrons injured by those businesses' tortious conduct. Nor has Congress mandated such a lower standard. But this Court needs to correct a judicial interpretation of §230 that, in several circuits—especially, now, the Fifth Circuit—has nearly eliminated tort liability for those businesses' by stretching a limited Good Samaritan provision beyond all recognition.

ARGUMENT

The courts that have considered §230 have fallen into two main camps, with several taking an expansive view of the statute and the Seventh Circuit articulating a limited view. The Fifth Circuit placed itself squarely into the expansive-view camp, with a holding that clearly conflicts with the Seventh Circuit's statements that §230 does not grant vast, limitless immunity from civil liability. The Fifth Circuit simultaneously created additional conflict within the group of cases taking an expansive view of §230 by going farther even than any other court on that side of the divide. If the Fifth Circuit's interpretation gains traction, the split will continue

to deepen. And if that view prevails, §230 will be applied in ways directly contrary to Congress's purpose of encouraging service providers to protect children who patronize their sites.

I. THE FIFTH CIRCUIT HAS REMOVED ANY MEANINGFUL LIMIT ON §230, EXPANDING ITS APPLICATION BEYOND THAT RECOGNIZED BY ANY OTHER COURT.

Understanding the effect of the Fifth Circuit's holding in this case requires going beyond what the Fifth Circuit purported to be doing and examining what its application of §230 actually did. Simply put, the Fifth Circuit effectively held that §230 immunizes an interactive service provider from all civil liability whenever a case involves a communication originating from someone other than the service provider.

Doe's claims simply have nothing to do with treating MySpace as the publisher or speaker of communications between Julie Doe and her attacker, Solis. Rather, Doe's claims treat MySpace as the proprietor of a business that negligently created an unreasonable risk of harm and then failed to take reasonable steps to protect Julie from that foreseeable harm. A bar may be held liable for negligently allowing children to enter, and a teen club can be held liable for negligence that leads to foreseeable physical or sexual attacks. In both circumstances, while the claim may be causally related to speech that occurs during the commission of the tort, the negligence claim would not depend on treating either the bar or the teen club as a publisher of that speech. There are, to be sure, state-law limits on recognized tort duties, but those limits are not at issue in this petition, only whether those claims

require treating MySpace as the publisher or speaker of inherently tortious communications. Compare Pet. App. 17a (not reaching the viability of Doe's claims under Texas law) with *Doe* v. *GTE Corp.*, 347 F.3d 655, 660-662 (CA7 2003) (finding plaintiffs stated no viable state cause of action).

Doe makes no claim against MySpace alleging that the online communications from Solis were in and of themselves tortious. In particular, the essence of "publisher" liability is liability premised on the publisher's imputed knowledge of the *content* of the relevant communications. *E.g.*, *Grace* v. *eBay, Inc.*, 16 Cal. Rptr. 3d 192, 199 (Cal. Ct. App. 2004), review granted and opinion superseded, 99 P.3d 2 (Cal. 2004) and review dismissed, cause remanded, 101 P.3d 509 (Cal. 2004). Doe does not seek to hold MySpace liable for content that was defamatory or obscene. It was not the content of communications between Julie and Solis that was tortious but the fact that MySpace facilitated the dangerous situation in which those individuals came into contact at all, without providing adequate safety measures or warnings to Julie or her parents.

Nor do Doe's claims allege liability for "any action voluntarily taken in good faith to *restrict* access to or availability of material" or "any action taken to enable or make available to information content providers or others the technical means to *restrict* access to material." 47 U.S.C. §230(c)(2) (emphasis added). The purpose of §230(c)(2) is to protect service providers from liability to users whose communications have been limited or removed because the providers have taken affirmative steps to prevent improper communications and, perhaps, to confirm that taking such steps does not make a

provider a publisher under defamation law. But Doe's claims allege liability for MySpace's *failure* to provide adequate restrictions preventing Julie's victimization in conjunction with a business model that affirmatively encourages young people to socialize with perfect strangers.

Thus §230(c)(2), which the Fifth Circuit did not reach, cannot support its holding any more than can §230(c)(1). As the Seventh Circuit has asked, "Why should a law designed to eliminate ISPs' liability to the *creators* of offensive material end up defeating claims by the victims of tortious or criminal conduct?" *GTE*, 347 F.3d, at 660. Indeed, given that §§230(c)(1) and 230(c)(2) are together expressly captioned "Protection for 'Good Samaritan' blocking and screening of offensive material," "Why not read § 230(c)(1) as a definitional clause rather than as an immunity from liability, and thus harmonize the text with the caption?" *GTE*, 347 F.3d, at 660 (citing *Carlisle* v. *United States*, 517 U.S. 416, 421 (1996)); cf. *Chicago Lawyers' Committee For Civil Rights Under The Law, Inc.* v. *Craigslist, Inc.*, 461 F.Supp.2d 681, 696 (ND Ill. 2006), aff'd, 519 F.3d 666 (CA7 2008) (explaining that §230(c) was enacted "specifically to overrule the court decision in *Stratton Oakmont, Inc.* v. *Prodigy Services Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995)," which treated an Internet service provider as a publisher for purposes of defamation liability because it undertook to remove offensive postings). MySpace's interpretation of §230(c)(2) to confer blanket immunity for *failure* to adequately protect children on its website, Br. in Opp. 18, turns that Good Samaritan provision—intended to incentivize service providers to protect children—on its head.

Because Doe's claims do not allege liability for the content of communications or actions taken to restrict access to materials, the Fifth Circuit's holding can only be understood to apply §230 simply because the causal chain resulting in Julie's assault included online communications. Because the Internet is, by definition, a communications medium, it is impossible to conceive of any cause of action against an interactive service provider that does not involve communications. The effect of the Fifth Circuit's holding is thus to remove any potential limit on the reach of §230, at least for any claim involving a third party. Under the Fifth Circuit's reasoning, a provider like MySpace cannot be held liable for its own tortious conduct as long as a communication with a third party forms part of the causal chain. In that circuit, then, §230(c)(1) has become an all-encompassing blanket of civil immunity.

Even the cases that have taken an expansive view of §230—by suggesting or holding that it could apply beyond claims sounding in the traditional law of defamation—have not gone so far as to apply it in a case like this one in which the content of the communications themselves is not an element of the tort alleged. MySpace's attempts to avoid the distinction between this case, in which the content of communications between Julie and Solis is not an element of Doe's claims, and the other cases applying §230 expansively fail. In all of those cases, the content of communications was a necessary element of the claims. *Zeran*, 129 F.3d, at 329, 332 (alleged harm caused by postings stating that plaintiff was selling Oklahoma City bombing t-shirts); *Ben Ezra, Weinstein, & Co.* v. *America Online Inc.*, 206 F.3d 980, 983 (CA10 2000) (harm caused by false securities-related information); *Universal Commc'n*

Systems, Inc. v. *Lycos, Inc.*, 478 F.3d 413, 416 (CA1 2007) (same); *Doe* v. *America Online, Inc.*, 783 So.2d 1010, 1011-1012 (Fla. 2001) (harm caused by communications advertising child pornography); *Gentry* v. *eBay, Inc.*, 99 Cal.App.4th 816, 820, 121 Cal.Rptr.2d 703, 706 (2002) (harm caused by false representations in advertisements); *Green* v. *America Online, Inc.*, 318 F.3d 465, 468-469 (CA3 2003) (pro se complaint alleging transmission of "harmful online messages" with content including malicious software and misrepresentations that plaintiff sought homosexual encounters).

II. THE SEVENTH CIRCUIT HAS ARTICULATED A LIMITED VIEW OF §230 THAT DIRECTLY CONFLICTS WITH THE FIFTH CIRCUIT'S LIMITLESS ONE.

The Fifth Circuit's interpretation of §230, which ignores whether the content of communications is an element of a plaintiff's claims, may be viewed as a clear break from *Zeran* and its progeny. Cf. *Zeran*, 129 F.3d, at 330 ("[Section] 230 creates a federal immunity to any cause of action that would make service providers liable for *information* originating with a third-party user of the service." (emphasis added)). Or it might be viewed as simply an unsurprising outgrowth of the *Zeran*-based jurisprudence that began untethering §230's application from its textual mooring. But regardless, the Fifth Circuit's transformation of §230 into a virtually limitless immunity from civil liability directly conflicts with the Seventh Circuit's view that §230 is nothing of the kind.

The Seventh Circuit recognizes that "§ 230(c) as a whole cannot be understood as a general prohibition of civil liability for web-site operators and other

online content hosts." *Chicago Lawyers' Committee For Civil Rights Under The Law, Inc.* v. *Craigslist, Inc.*, 519 F.3d 666, 669-670 (CA7 2008) (quoting *GTE*, 347 F.3d, at 655); see also *Craigslist*, 461 F.Supp.2d, at 696 ("Congress did not intend to grant a vast, limitless immunity."). While *Zeran* would afford immunity for "*any* cause of action that would make service providers liable for information originating with a third-party user of the service," *Zeran*, 129 F.3d, at 330 (emphasis added), the truly limited view of §230 confines its application to those cases in which the plaintiff brings a claim sounding in defamation that seeks to impose traditional "publisher" liability on an interactive service provider. *Craigslist*, 461 F.Supp.2d, at 696-697 (limiting "the immunity afforded under Section 230 to those claims that require 'publishing' as an essential element—as opposed to *any* cause of action" and noting that §230 was enacted to abrogate *Statton Oakmont*, which applied traditional publisher liability to an online service provider).[1]

The Fifth Circuit's application of §230 to claims that are so far beyond traditional publisher liability in the realm of defamation law is not even arguably in harmony with the Seventh Circuit's view of §230. MySpace cannot gloss over that conflict simply by asserting that the Fifth Circuit purported to apply §230 because the claim was "directed at MySpace acting in its '"publishing, editorial, and/or screening

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[1] See also *e.g.*, *Dimeo* v. *Max*, 433 F.Supp.2d 523, 528 (ED Pa. 2006) (indicating that §230(c)(1) grants immunity from claims seeking to impose the "traditional treatment of publishers under statutory and common law").

capacities."'" Br. in Opp. 15 (quoting Pet. App. 11a).[2] Aside from the Fifth Circuit's disregard of whether Doe's claims contained any content-based element, neither that court nor MySpace in its brief in opposition provides any analysis demonstrating that Doe's claims fall within the scope of publisher liability under longstanding defamation law. Cf. *Barrett* v. *Rosenthal*, 40 Cal.4th 33, 47, 146 P.3d 510, 518 (2006) (noting that "publication is an element of defamation"); *id.*, at 66, 146 P.3d., at 520 ("Those terms [publisher and speaker], employed in section 230(c)(1), are drawn from the law of defamation.").

Conclusory assertions that the Fifth Circuit's holding is consistent with the Seventh Circuit's interpretation of §230 do not make it so. The effect of the Fifth Circuit's holding is to eviscerate any meaningful constraint on §230(c)(1), an effect that cannot be harmonized with the Seventh Circuit's recognition that §230(c)(1) might not confer any "immunity" at all, *Craigslist*, 519 F.3d at 669-670; *GTE*, 347 F.3d, at 655, and certainly is not "a general prohibition of civil liability." *Craigslist*, 519 F.3d at 669-670; accord *GTE*, 347 F.3d, at 655. MySpace's suggestion that the Seventh Circuit was merely referring to §§230(e)(1) and (2), Br. in Opp. 15 & n.4, fails. Section 230(e)(1) preserves *criminal* liability, which, by definition, is not civil liability. And, while §230(e)(2) expressly preserves civil liability for intellectual property infringements, §230(e)(3) provides that "[n]othing in this section shall be construed to prevent any State from enforcing *any* State law that is consistent with this section." (emphasis added) That broad language would be

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[2] The portion of the court of appeals's opinion quoted by MySpace was, in fact, quoting the district court's opinion.

superfluous if intellectual-property liability were the only civil liability exempted from an otherwise limitless immunity granted by §230(c). And if Congress intended to preserve state *criminal* liability only, it would have used language mirroring §230(e)(1) (or simply included state criminal statutes in that section). See 47 U.S.C. §230(e)(1) (providing that §230 has no effect on any "Federal criminal statute").

III. THE PRESUMPTION AGAINST PREEMPTION REQUIRES CURTAILING THE FIFTH CIRCUIT'S EXPANSIVE VIEW OF §230 AND EMBRACING THE SEVENTH CIRCUIT'S TEXT-BASED VIEW.

Section 230(e)(3)'s express preservation of "any State law that is consistent with this section" would be meaningless if, as the Fifth Circuit's decision necessarily implies, §230 preempts any state-law cause of action involving a communication originating from a third party. The Fifth Circuit's holding ignores the presumption against finding that Congress has preempted state law and the principle that preemption provisions are thus to be construed narrowly. That holding is thus inconsistent with a long line of cases from this Court and the circuits. See, *e.g.*, *Bates* v. *Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005); *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 485 (1996); *N.Y. State Conf. of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 514 U.S. 645, 654 (1995); *Montalvo* v. *Spirit Airlines*, 508 F.3d 464, 474 (CA9 2007); *Branche* v. *Airtran Airways, Inc.*, 342 F.3d 1248, 1256 (CA11 2003).

In its attempt to defend the Fifth Circuit's expansive interpretation of §230, MySpace simply ignores the presumption against preemption, failing even to address the presumption. But that

presumption is particularly strong when the subject matter—in this case protection of child welfare and matters of health and safety—is within the traditional regulatory authority of the States. See *Bates*, 544 U.S., at 449; see also *Medtronic, Inc.*, 518 U.S., at 485; *Anderson* v. *Sara Lee Corp.*, 508 F.3d 181, 192 (CA4 2007). This case vividly demonstrates the need for the Court to reign in the overly expansive jurisprudence that has culminated in the Fifth Circuit's finding §230 to be a fount of boundless immunity and confirm the correctness of the Seventh Circuit's restrained view, which appropriately respects statutory text, congressional purpose, and state sovereignty.

CONCLUSION

For these reasons, and those discussed more fully in the petition for a writ of certiorari, the petition should be granted.

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